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INTRODUCTION

In her brief, the Plaintiff/Appellee, Bettye C. Carmichael ("Plaintiff"), carefully sidesteps the pivotal issue, how or why the doctrine of *res judicata* is not applicable to the claims she asserted against EMC Mortgage Corporation ("EMC") below. *See* Appellee's Brief at 9-12. In fact, her brief does not even mention the term. Instead, she simply opines without authority that she "still has a right to bring suit because that [sic] deed of trust is void as a matter of law," despite the Bankruptcy Court orders denying her claim and authorizing the sale of her mortgage to EMC "free and clear." *See* Appellee's Brief at 9. Given that her claims were previously rejected by the Bankruptcy Court, Plaintiff's effort "to relitigate any of the matters that were raised *or could have been raised* [in the bankruptcy proceeding] is barred under the doctrine of *res judicata*." *See Bank of Lafayette v. Baudoin,* 981 F.2d 736, 739 (5th Cir. 1993) (emphasis in original; internal quotation marks and citation omitted).

Likewise, Plaintiff has also failed to establish that EMC waived its right to compel arbitration. While she makes naked allegations that EMC "actively participated in these proceedings," R. 270, she failed to prove that EMC had "invoke[d] the judicial machinery to [her] detriment or prejudice" or "evince[d] a desire to resolve the arbitrable dispute through litigation rather than arbitration." *See Keytrade USA, Inc. v. Ain Temouchent M/V,* 404 F.3d 891, 897 (5th Cir. 2005) (internal quotation marks omitted).

Finally, all of Plaintiff's substantive, "kitchen sink," defenses to arbitration are equally without merit. The undisputed evidence established that there was "a valid agreement to arbitrate between the parties," and that Plaintiff's claims against EMC "fall[] within the scope of that arbitration agreement." *See Webb v. Investacorp, Inc.,* 89 F.3d 252, 258 (5th Cir. 1996). As the assignee of her mortgage from UCLC, EMC is entitled to enforce the arbitration agreement.

See JPMorgan Chase Bank, N.A. v. Lott, 2007 WL 30271, **5 (S.D. Miss. Jan. 3, 2007)(attached hereto in the Appendix of Authorities). Her claim that the entire contract is subject to invalidation for fraud is also one that must be resolved "by the arbitrator in the first instance." *See Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 446 (2006). And finally, Plaintiff fails to prove that the arbitration agreement was either procedurally or substantively unconscionable. *See, e.g., Green Tree Financial Corp.- Alabama v. Randolph,* 531 U.S. 79, 91-92 (2000); *Washington Mutual Finance Group, LLC v. Bailey,* 364 F.3d 260, 264-65 (5th Cir. 2004).

Accordingly, the Circuit Court erred by failing to dismiss Plaintiff's claims with prejudice, or alternatively by failing to compel arbitration.[1]

[1] Plaintiff relies upon the venerable "any set of facts" standard in arguing that dismissal was improper. *See* Appellee's Brief at 8. While this Court previously adopted that standard under the Mississippi Rules of Civil Procedure, *see Stanton & Associates, Inc. v. Bryant Construction Co., Inc.,* 464 So.2d 499, 405 (Miss. 1985) (citing *Conley v. Gipson,* 355 U.S. 41 (1957)), the U.S. Supreme Court recently concluded that this standard has "earned its retirement." *See Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1969 (2007) ("The phrase [no set of facts] is best forgotten as an incomplete, negative gloss on an accepted pleading standard").

ARGUMENT

I. THE CIRCUIT COURT ERRED BY DENYING THE MOTION TO DISMISS.

A. Plaintiff's Claims are Barred by *Res Judicata*.

In her brief, Plaintiff makes no attempt to refute the principal argument raised by EMC on appeal, *i.e.*, that her claims are barred by *res judicata*. Instead, she conclusively asserts that she "still has a right to pursue her claim that the deed of trust is void."[2] *See* Appellee's Brief at 10. Plaintiff's argument fails to address the very nature of the doctrine and its consequences.

Res judicata is intended to prevent endless litigation by "ensur[ing] the finality of decisions." *See Brown v. Felsen*, 442 U.S. 127, 131 (1979) (commenting that, "Res judicata thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes."). The doctrine bars not only the relitigating of claims that were actually litigated, but those that "could have been raised in [the prior] action." *See Rivet v. Regions Bank of Louisiana,* 522 U.S. 470, 476 (1998) (internal quotation marks and citation omitted); *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir. 1999) ("claim preclusion, or *res judicata*, bars the litigation of claims that either have been litigated or should have been raised in an earlier suit."); *Franklin Collection Service, Inc. v. Stewart,* 863 So.2d 925, 929 (Miss. 2003) ("Res judicata bars

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[2] The only authority cited by Plaintiff in support of her contention is *Federal Deposit Insurance Co. v. Bledsoe* in which the Fifth Circuit observed that, "An assignee stands in the shoes of his assignor." *See* Appellee's Brief at 11 (quoting *Bledsoe,* 989 F.2d 805, 810 (5th Cir. 1993)). Not only does *Bledsoe* have no factual application to the instant case, the legal proposition upon which Plaintiff relies actually confirms that she cannot obtain any relief in this matter. She challenged the validity and enforceability of her mortgage in UCLC's bankruptcy. R. 268 (proof of claim). Her claim was denied by the bankruptcy court. R. 108-25; R.E. at D. Her loan was then assigned to EMC, "free and clear." R. 126-52; R.E. at D. Thus, EMC stands squarely in the "shoes" of UCLC with respect to the claims Plaintiff now seeks to relitigate in this action.

all issues that might have been (or could have been) raised and decided in the initial suit").[3] Moreover, *res judicata* applies even though "the [original] judgment may have been wrong or rested on a legal principle subsequently overruled." *See Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 398 (1981); *Airborne Freight Corp. v. United States,* 195 F.3d 238, 240 (5th Cir. 1999) ("We do not collaterally review and overturn orders of other courts that have become final and unappealable, even if we fear the order may have issued in error."). Thus, despite Plaintiff's displeasure with the doctrine and its effect, it remains fully applicable to all of the claims she asserted against EMC below. The Bankruptcy Court having validated EMC's mortgage, Plaintiff cannot now challenge its validity.

Res judicata applies where (1) the parties in separate actions are identical or in privity, (2) the judgment in the prior action was issued by a court with jurisdiction, (3) the prior judgment was on the merits, and (4) the same claim or cause of action is at issue in both cases. *See Test Masters Educational Svcs., Inc. v. Singh,* 428 F.3d 559, 571 (5th Cir. 2005). Significantly, Plaintiff has not disputed that EMC was in privity with UCLC as its successor-in-interest. *See, e.g., Howell Hydrocarbons, Inc. v. Adams,* 897 F.2d 183, 188 (5th Cir. 1990) (holding that privity exists with "successor in interest to the party's interest in the property"). Likewise, Plaintiff does not challenge the jurisdiction of Bankruptcy Courts to "enter appropriate orders

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[3] Despite its prior precedent, this Court has recently held that "[t]he doctrine of res judicata applies 'only to questions actually litigated in a prior suit, and not to questions which might have been litigated.'" *See Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis & Dove,* 965 So.2d 1041, 1049 (Miss. 2007). This holding appears to be based upon confusion between the doctrines of *res judicata* and collateral estoppel. *See Channel v. Loyacono,* 954 So.2d 415, 425 (Miss. 2007) (distinguishing between *res judicata* and collateral estoppel, and holding that "'collateral estoppel, unlike the broader question of res judicata, applies only to questions actually litigated in a prior suit, and not to questions which might have been litigated.'"). Given that the federal common law doctrine of *res judicata* is applicable in this matter, the apparent conflict need not be resolved. *See* EMC's Principal Brief at 11-12.

and judgments" providing for the "allowance or disallowance of claims against the estate," and "approving the sale of property." 28 U.S.C. § 157(b)(2)(B) & (N). She also does not contest that both the August 30, 2000 order denying her claim (R. 108-25; R.E. at E) and the September 13, 2000 order approving the sale of her mortgage "free and clear" (R. 126-52; R.E. at E) were final adjudications on the merits.[4] *See Bank of Lafayette v. Baudoin,* 981 F.2d 736, 742 (5th Cir. 1993) (holding that bankruptcy orders "authorizing the sale of part of the estate or confirming such sale are final judgments on the merits for res judicata purposes"). Because the Plaintiff attached her Complaint to her Proof of Claim (R. 268), the claims asserted in both the Bankruptcy and Circuit Courts are based upon identical pleadings. Therefore, "[i]t is difficult to image a more common nucleus of operative facts." *Id.* at 743. Thus, it cannot be disputed that all of the elements of *res judicata* were satisfied. As a result, all of Plaintiff's claims against EMC were precluded and should have been dismissed with prejudice.

B. <u>The Deed of Trust Is Not Void</u>.

Quite aside from the clear preclusion of her claims under the doctrine of *res judicata*, Plaintiff's claims also fail on the merits. Without citing any authority, Plaintiff contends that she "still has a right to bring suit because that [sic] deed of trust is void as a matter of law."[5] *See* Appellee's Brief at 9. Because it was allegedly "procured through fraud and improperly

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[4] Plaintiff concedes that her mortgage was assigned to EMC pursuant to this order. *See* Appellee's Brief at 6.

[5] Plaintiff's failure to cite supporting authority alone renders this argument without merit. *See Crenshaw v. Roman*, 942 So.2d 806, 809 n. 4 (Miss. 2006); *In re Adoption of a Minor Child*, 931 So.2d 566, 578 (Miss. 2006).

notarized," she reasons that the doctrine of *res judicata* has no application to her claims. *See* Appellee's Brief at 11. Both her premises and legal conclusion are patently erroneous.[6]

A conveyance obtained through fraud is not void, but merely "voidable." *See Memphis Hardwood Flooring Co. v. Daniel,* 771 So.2d 924, 933 (Miss. 2000) (holding "that fraud in the procurement of the deeds vitiates [] consent and renders the deeds voidable."); *Turner v. Wakefield,* 481 So.2d 846, 848-49 (Miss. 1985) ("assuming the fact of fraud, a contract obligation obtained by fraudulent representation is not void, but voidable."). As a result, such a conveyance is "operative to convey the property and vest the separate and distinct . . . estate . . . unless and until set aside by the court." *See Neal v. Teat,* 126 So.2d 124, 127 (Miss. 1961); *Dent v. Calhoun,* 326 So.2d 320, 321 (Miss. 1976) (holding that voidable deed "was effective to vest title in the appellees (grantees) until the instrument was vacated or set aside by some court."). And when challenged, courts will "not lightly disturb the efficacy of an otherwise valid deed." *See Estate of Lane v. Henderson,* 930 So.2d 421, 428 (Miss. Ct. App. 2006) (citing *Anderson v. Burt,* 507 So.2d 32, 36 (Miss. 1987)).

In the bankruptcy proceedings, Plaintiff argued that UCLC and the other defendants committed multiple acts of fraud entitling her "to have all closing documents deemed void ab initio thereby setting aside [the] mortgage on [her] property."[7] R. 20; R.E. at C. However, the

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[6] Below, Plaintiff argued that she was still entitled to challenge the deed of trust by way of recoupment. As her brief makes no mention of recoupment, that argument has been abandoned on appeal. *See Kendrick v. Mississippi Farm Bureau Ins.,* 996 So.2d 132, 133 (Miss. Ct. App. 2008).

[7] In an apparent attempt to bolster her fraud claim, Plaintiff references certain criminal proceedings against other parties allegedly involved in the underlying transaction. *See* Appellee's Brief at 7. Not only is there no evidence that these criminal proceedings in any way relate to the Plaintiff's mortgage, there is no evidence of those proceedings in the appellate record. Thus, those matters are not properly before this Court and cannot be considered on appeal. *See Peden v. City of Gautier,* 870 So.2d 1185, 1188 (Miss. 2004); *Ditto v. Hinds County,* 665 So.2d 878, 880 (Miss. 1995).

Bankruptcy Court rejected her claim, finding that it should be both "expunged" and "disallowed in [its] entirety." R. 109; R.E. at E. Thus, the deed of trust was not "void as a matter of law," as Plaintiff would have it, and the Bankruptcy Court specifically rejected her fraud claim when it denied her proof of claim against UCLC.[8] *See Memphis Hardwood,* 771 So.2d at 933. Having lost her "fraud" claim in the Bankruptcy Court, she cannot re-litigate it in the Circuit Court. *See Baudoin,* 981 F.2d at 739 ("'Any attempt by the parties to relitigate any of the matters that were raised *or could have been raised* therein is barred under the doctrine of *res judicata.*'") (emphasis in original) (quoting *In re Brady* 936 F.2d 212, 215 (5th Cir. 1991)).

The same is true with respect to Plaintiff's renewed attack on the acknowledgement of the deed of trust. *See* Appellee's Brief at 11. State law provides that instruments involving title to real property "shall not be admitted to record in the clerk's office unless the execution thereof be first acknowledged or proved." *See* Miss. Code Ann. § 89-3-1. Recording is required only for the purpose of "serv[ing] as constructive notice to bona fide creditors without notice."[9] *See Associates Financial Services Co. of Mississippi, Inc. v. Bennett,* 611 So.2d 973, 976 (Miss. 1992). Such "recordation statutes are to be liberally construed in order that acknowledgments may be upheld whenever there has been substantial compliance with the law." *See Morton v.*

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[8] The fact that the deed of trust was not void but "voidable" at best, further refutes Plaintiff's suggestion that the bankruptcy court was required to "reform[] past liens," in order to preclude her claims. *See* Appellee's Brief at 6.

[9] Plaintiff expends considerable prose arguing that EMC had "actual" notice of "the defective deed of trust" and was not "a bona fide purchaser." *See* Appellee's Brief at 10. EMC readily concedes that it was not a bona fide purchaser for value of the subject property. Rather, it was an assignee of the underlying mortgage which was sold "free and clear," after all of Plaintiff's claims to invalidate the deed of trust had already been denied by the bankruptcy court. R. 108-52; R.E. at D. Thus, the issue of "notice" is immaterial.

Resolution Trust Corp., 918 F. Supp. 985, 992 (S.D. Miss. 1995). Thus, "there is a presumption that a certificate of acknowledgment states the truth." *See Arnold v. Byrd,* 222 So.2d 410, 411 (Miss. 1969). However, even where there is an error, "a defective acknowledgment has no effect on the validity of the deed as between the parties." *See Bennett,* 611 So.2d at 976; *Cotton v. McConnell,* 435 So.2d 683, 687 (Miss. 1983) ("It is settled law in this state that a deed defectively acknowledged may still be good between the parties to it.").

The Bankruptcy Court already disposed of Plaintiff's "defective acknowledgment" claim by which she contended that "no . . . Notary Public was present at the closing," and that the documents were subsequently "backdated to a time different from the true and actual closing." R. 8; R.E. at C. She argued then (as well as now) that "falsely executing and swearing to said notarized documents . . . render[ed] all documents null and void as a violation of state law." R. 10; R.E. at C. The Bankruptcy Court considered, rejected and consequently "disallowed" this claim. R. 109; R.E. at E. Thus, not only was Plaintiff's challenge to the acknowledgement finally denied for *res judicata* purposes, it had no substantive impact on the validity of the deed of trust as between Plaintiff and EMC. *See Baudoin,* 981 F.2d at 739; *Bennett,* 611 So.2d at 976.

Accordingly, the Bankruptcy Court orders were completely preclusive as to all of the claims Plaintiff sought to advance against EMC below. As a result, the Circuit Court's failure to dismiss that action against EMC based upon the doctrine of *res judicata* and the preclusive effect of the Bankruptcy Court orders was erroneous.

II. THE CIRCUIT COURT ERRED WHEN IT RULED THAT EMC WAIVED ITS RIGHT TO ARBITRATION.

A. The Law Disfavors Waiver of Arbitration.

After EMC moved to compel arbitration below, Plaintiff filed a response on February 20, 2007, that did not raise the issue of waiver. R. 256-59; R.E. at I. Five months later, she filed an amended response that asserted for the first time that EMC had waived its right to compel arbitration. R. 269-71. Without citing any factual basis to support its conclusion, the Circuit Court subsequently found that EMC had "actively participated in the litigation process which resulted in prejudice to the plaintiff." R. 316; R.E. at J. Both the Plaintiff's waiver argument and the Circuit Court's finding of waiver were erroneous.

The FAA establishes "a strong presumption against waiver of arbitration." *See Subway Equipment Leasing Corp. v. Forte*, 169 F.3d 324, 326 (5th Cir. 1999) (citations omitted); *Univ. Nursing Associates, PLLC v. Phillips*, 842 So.2d 1270, 1276 (Miss. 2003). Thus, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver." *See Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983). Waiver requires that a party "invoke[] the judicial machinery to the detriment or prejudice of the other party" or "some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration." *See Keytrade USA, Inc. v. Ain Temouchent M/V*, 404 F.3d 891, 897 (5th Cir. 2005) (internal quotation marks and citations omitted). A party "only invokes the judicial process to the extent it litigates a specific claim it subsequently seeks to arbitrate." *See Forte*, 169 F.3d at 328.

"[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *See Green Tree Financial Corp.- Alabama v. Randolph,* 531 U.S. 79, 91 (2000). Based upon the federal pro-arbitration policy, "a party alleging waiver of arbitration must carry a heavy burden." *See Forte,* 169 F.3d at 326. "This is particularly true when the party seeking arbitration has included a demand for arbitration in its answer, and the burden of proof then 'falls even more heavily on the party seeking to prove waiver.'" *Steel Warehouse Co., Inc. v. Abalone Shipping Ltd. of Nicosai,* 141 F.3d 234, 238 (5th Cir. 1998) (citation omitted); *Phillips*, 842 So.2d at 1276. "[M]ere delay falls far short of the waiver requirements" for arbitration. *See Gulf Guaranty Life Ins. Co. v. Connecticut General Life Ins. Co.,* 304 F.3d 476, 484 (5th Cir. 2002). Plaintiff made no effort to satisfy her burden below.

B. Plaintiff Failed to Meet Her Burden of Proving Waiver.

Below, Plaintiff argued only that "EMC has actively participated in these proceedings since 2003." R. 270. She made no attempt to characterize EMC's alleged "participation," cited no evidence of substantive participation, and did not establish how the "participation" had caused her any prejudice. R. 269-70. The record simply contains no facts whatsoever supporting the waiver argument.

When EMC answered on June 3, 2005, its first defense was a "Motion to Enforce Agreement to Mediate or Arbitrate." R. 39; R.E. at H. Thereafter, EMC did not undertake any activity that advanced this litigation. It propounded no discovery, responded to no discovery, subpoenaed no witnesses or documents, took no depositions, and did not otherwise invoke the judicial process in any respect.[10] *See Phillips*, 842 So.2d at 1277 (holding that even "minimal

[10] Although not specifically cited as evidence of any waiver, Plaintiff's brief notes that EMC's answer also contained a counterclaim. *See* Appellee's Brief at 7. The filing of a compulsory counterclaim, does

pretrial activities" did not establish waiver). Thus, EMC did not "evince[] a desire to resolve the arbitrable dispute through litigation rather than arbitration." *See Keytrade USA,* 404 F.3d at 897. Indeed, by the motion, EMC actively sought to enforce its arbitration rights.

Plaintiff has neither alleged nor proven any prejudice resulting from EMC's actions (or inactions). *See* Appellee's Brief at 11-12. At best, her allegations establish "mere delay" by EMC in seeking arbitration. *Gulf Guaranty,* 304 F.3d at 484. Delay, however, cannot establish waiver.[11] Accordingly, Carmichael has not come close to meeting her "heavy burden" of establishing a waiver by EMC.

Finally, the arbitration agreement itself specifically provided that "[a]n action to specifically enforce this Agreement or a motion to compel arbitration may be brought at ***any time, even after a Claim has been raised in a court of law*** or a Transaction has been completed, discharged or paid in full." R. 254; R.E. at E (emphasis added). Such non-waiver provisions are binding and further preclude any finding of waiver in this instance. *See, e.g., Fletcher v. U.S. Restaurant Properties, Inc.*, 881 So.2d 333, 338 (Miss. Ct. App. 2004) (declining to find waiver based upon non-waiver provision).

The FAA imposes a strong presumption against waiver of arbitration when the movant has included an arbitration demand in its answer, which EMC did, and when the moving party has not invoked the judicial process to the detriment or prejudice of the non-movant, which EMC

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not constitute a waiver of the right to arbitration. *See Williams v. Cigna Financial Advisors, Inc.,* 56 F.3d 656, 662 (5th Cir. 1995).

[11] The only authority cited by Plaintiff in support of her waiver argument is *Pass Termite & Pest Control, Inc. v. Walker,* 904 So.2d 1030 (Miss. 2004). *See* Appellee's Brief at 12. *Walker*, however, is easily distinguishable from the instant case as the Court found not only delay, but the additional "invocation of the discovery process after failing to raise the defense of arbitration in [] initial pleading." *Id.* at 1035.

did not. Plaintiff has failed to articulate any facts that would justify an exception to that presumption in this instance. Consequently, Plaintiff's waiver argument fails and the trial court erred in denying EMC's motion to compel arbitration.

III. PLAINTIFF'S CLAIMS ARE SUBJECT TO ARBITRATION.

A. EMC Met Its Burden of Establishing That Plaintiff's Claims Are Arbitrable.

Plaintiff charges that EMC did not establish a prima facie case for arbitration. *See* Appellee's Brief at 12. A review of the undisputed evidence, however, clearly refutes this suggestion.

When considering a motion to compel arbitration, a court must initially "determine whether the parties agreed to arbitrate the dispute in question." *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996); *Gulf Insurance Co. v. Neel-Schaffer, Inc.*, 904 So.2d 1036, 1042 (Miss. 2004). "This determination involves two considerations: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." *Webb*, 89 F.2d at 258. In the instant case, the answer to both considerations is clearly, "Yes."

Plaintiff executed the arbitration agreement when she entered into the mortgage loan, agreeing that "any Claim . . . shall be resolved by binding arbitration." R. 254; R.E. at E. The arbitration agreement defined the term "Claim" as follows:

> "Claim" means any case, controversy, dispute, tort, disagreement, lawsuit, claim, or counterclaim, and other matters in question now or hereafter existing between Lender and Borrower. A Claim includes, without limitation, anything arising out of, in connection with, or relating to: (a) this Agreement; (b) to the advertisement, solicitation, application, processing, closing or servicing of this Transaction or any instruments executed in conjunction with it (collectively the "Loan Agreements" including but not limited to the terms of the loss, representations, promises, undertakings or covenants made relating to the Loan, or Loan

> Agreements executed in conjunction with the Note and the Security Instrument, services provided under the Loan Agreements, and the validity and construction of the Loan Agreements); (c) any Transaction; (d) the construction, manufacture, advertisement, sale, installation or servicing of any real or personal property which secures this Transaction; (e) any past, present, or future insurance, service, or product that is offered or sold in connection with a Transaction; (f) any documents or instruments that contain information about or document any Transaction, insurance, service, or product; and (g) any act or omission by Lender regarding any Claim.

R. 254; R.E. at E. Accordingly, the arbitration agreement constitutes a valid and enforceable agreement to arbitrate all disputes relating to the mortgage loan, and is fully applicable to the claims asserted by the Plaintiff in Circuit Court.

Arbitration clauses that apply to "all claims, demands, disputes or controversies of every kind or nature" are deemed to be very broad and to cover all possible claims that might arise. *See Municipal Energy Agency of Miss. v. Big Rivers Electric Corp.*, 804 F.2d 338, 342 (5th Cir. 1986); *In re Sedco, Inc.*, 767 F.2d 1140, 1145 (5th Cir. 1985) ("[i]t is difficult to imagine broader general language than . . . 'any dispute'") (quoting *Caribbean Steamship Co. v. Sonmez Denizcilik Ve Ticaret*, 598 F.2d 1264, 1266 (2d Cir. 1979)). Any doubt concerning the scope of an arbitration clause must be resolved in favor of coverage. *Harvey v. Joyce*, 199 F.3d 790, 793 (5th Cir. 2000). As her amended complaint established, all of Plaintiff's claims against EMC are based upon the mortgage loan she entered into with UCLC. R. 14-21; R.E. at F. By its explicit terms, all of those claims are within the scope of the arbitration agreement.

B. <u>EMC is Entitled to Enforce the Arbitration Agreement</u>.

Plaintiff contends that EMC cannot compel arbitration against her because she "did not sign an arbitration agreement with [it]," *i.e.*, EMC was not a party to the original agreement. *See* Appellee's Brief at 13. This argument simply makes no sense. Were Plaintiff correct, no

assignee of any agreement could ever enforce its terms. Moreover, both the terms of EMC's purchase of UCLC's assets and the FAA refute Plaintiff's contention.

"[A] valid and unqualified assignment operates to transfer to the assignee all the right, title, or interest of the assignor in the thing assigned." *See EB, Inc. v. Allen,* 722 So.2d 555, 564 (Miss. 1998) (internal quotation marks and citation omitted). Under the FAA, "[it] is [also] well-established that a non-signatory to an arbitration agreement can compel arbitration where the claims against the non-signatory – whether an assignee or merely a third-party – and the signatory are intertwined." *See JPMorgan Chase Bank, N.A. v. Lott,* 2007 WL 30271, **5 (S.D. Miss. Jan. 3, 2007); *Fradella v. Seaberry,* 952 So.2d 165, 175 (Miss. 2007) (holding that "non-signatories to the real estate contract which contained the arbitration clause, could . . . seek the benefit of the arbitration clause.").

In this matter, Plaintiff agreed to arbitrate any claims relating to the "Loan Agreements executed in conjunction with the Note and Security Instrument." R. 254; R.E. at E. Her mortgage was assigned to EMC pursuant to the terms of the Bankruptcy Court order authorizing it to purchase certain assets of UCLC. R. 126-52; R.E. at E. And as Plaintiff has conveniently observed, an assignee stands in the "shoes" of its assignor. *See* Appellee's Brief at 11 (citing *Bledsoe,* 989 F.2d at 810). Thus, EMC was clearly entitled to enforce the arbitration agreement against her both as an assignee of the mortgage and under the FAA.

C. Plaintiff's Defenses to Arbitration Are an Attack on the Transaction as a Whole and, as Such, Are Referrable to Arbitration.

In a further effort to avoid arbitration, Plaintiff contends that "UCLC fraudulently induced [her] into signing the closing documents." *See* Appellee's Brief at 14. As a result, she reasons that "if the entire contract was subject to [such] contract defenses, the arbitration clause

within that contract would be as well." *See* Appellee's Brief at 13. Her contention does not withstand scrutiny.

The Supreme Court has long held that under the FAA a "court may consider only issues relating to the making and performance of the agreement to arbitrate." *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). The statute does not allow the "court to consider claims of fraud in the inducement of a contract generally," which is precisely what Plaintiff asks this Court to do. *Id.* Relying upon *Prima Paint,* the Court has recently held that "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract," and that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *See Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 445-46 (2006).

As her pleadings and brief clearly show, all of Plaintiff's fraud and other defenses pertain to the underlying deed of trust and the transaction as a whole, rather than to the arbitration agreement alone. R. 5-21; R.E. at C & F. For instance, her brief simply alleges that "[t]he deed of trust in the present case was falsely notarized, procedurally and substantively unconscionable, and signed by [Plaintiff] as a result of fraud." *See* Appellee's Brief at 13. Neither her complaint nor her amended complaint makes any reference to the arbitration agreement. R. 5-21; R.E. at C & F. Thus, all of these contractual defenses would be subject to resolution "by the arbitrator in the first instance." *See Buckeye Check Cashing,* 546 U.S. at 446.

D. <u>The Arbitration Agreement Was Not Unconscionable.</u>

Plaintiff next argues that the arbitration agreement is both procedurally and substantively unconscionable. *See* Appellee's Brief at 14. Specifically, she claims that "UCLC and its employees abused their relationship with [her] by not explaining the closing documents prior to

her signing" them, and "intentionally concealed material facts [] about her options, preventing her from considering her alternatives." *See* Appellee's Brief at 14. She also contends that the arbitration fees called for by the agreement were "exorbitant." *See* Appellee's Brief at 14. All of these arguments are without merit.

Under Mississippi law, contracts that are either procedurally or substantively unconscionable are not enforceable. *See Vicksburg Partners, L.P. v. Stephens,* 911 So.2d 507, 517 (Miss. 2005). Procedural unconscionability is proven by showing "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract's terms." *See Russell v. Performance Toyota, Inc.,* 826 So.2d 719, 725 (Miss. 2002) (internal quotation marks and citation omitted). Conversely, substantive unconscionability requires a demonstration that "the terms of the contract are . . . oppressive," or so "one-sided . . . [that] one party is deprived of all the benefits of the agreement." *Id.; Stephens,* 911 So.2d at 521.

Plaintiff's effort to equate unconscionability with the originator's alleged failure "[to]explain[] the closing documents prior to her signing" them rings hollow. *See* Appellee's Brief at 14. UCLC had no obligation to read or explain the closing documents to her. *See Mississippi Credit Center, Inc. v. Horton,* 926 So.2d 167, 177-78 (Miss. 2006) (holding that defendant "had no affirmative duty to disclose, explain or affirmatively act on behalf of [the consumer], and she cannot attribute her lack of knowledge to the Defendant's failure to explain."). Rather, she had "an affirmative duty to read the contract[s]," and "knowledge of the[ir] . . . terms is imputed to [her] irrespective of whether [she] read the contract[s]." *See Washington Mutual Finance Group, LLC v. Bailey,* 364 F.3d 260, 264-65 (5th Cir. 2004).

Plaintiff also "had no right to assume she was getting the best deal possible." *See Baldwin v. Laurel Ford Lincoln-Mercury, Inc.*, 32 F.Supp.2d 894, 900 (S.D. Miss. 1998). Instead, the law "presume[s] that parties enter into private transactions for their own personal benefit." *See Andrus v. Ellis,* 887 So.2d 175, 182 (Miss. 2004).

Likewise, Plaintiff cannot establish that the arbitration agreement was unconscionable based on the expense of proceedings. Where "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *See Green Tree,* 531 U.S. at 92; *Primerica Life Ins. Co. v. Brown,* 304 F.3d 469, 471 n. 1 (5th Cir. 2002) (holding that party resisting arbitration "bears the burden of showing the likelihood of incurring prohibitive costs."). In this instance, however, Plaintiff has not offered any evidence as to what the actual costs of arbitration would be. R. 256-59; R.E. at I. Moreover, she offered no proof of her inability to pay those allegedly "exorbitant" costs.[12] *See Green Tree*, 531 U.S. at 91 (holding that mere allegation of "'risk' that [plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.").

CONCLUSION

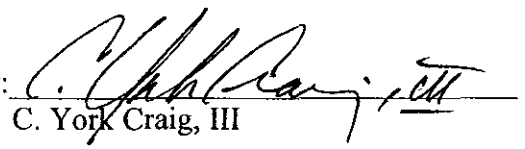
As established herein, all of Plaintiff's claims against EMC are precluded by the doctrine of *res judicata* because they were previously addressed and disposed of by orders of the Bankruptcy Court. Accordingly, the Circuit Court's decision should be reversed, and judgment should be rendered by this Court in favor of EMC, dismissing all of Plaintiff's claims with prejudice. Alternatively, the Circuit Court's denial of EMC's motion to compel arbitration

[12] The rules of the American Arbitration Association ("AAA") that apply to the arbitration agreement also limit consumers' costs to $375 for claims up to $75,000. *See* www.adr.org ("Consumer Arbitration Costs").

should be reversed, and judgment should be rendered compelling Plaintiff to arbitrate any claims against EMC.

Respectfully submitted,

EMC MORTGAGE CORPORATION

By: 
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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing document via hand delivery, on the following:

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Honorable Winston Kidd
Hinds County Circuit Judge
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Dated this 30th day of March, 2009.

C. York Craig, III

APPENDIX OF AUTHORITIES

Cases

Statutes