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November 14, 2019

VIA ECF AND HAND DELIVERY

The Honorable Anita B. Brody
United States District Judge for the Eastern District of Pennsylvania
601 Market Street
Room 7613
Philadelphia, PA 19106-1717

Re: Thrivest Specialty Funding, LLC v. William E. White
USDC, E.D. Pa., Civil Action No. 2:18-cv-1877

Dear Judge Brody:

I am pleased to report that the parties have resolved their dispute.

Enclosed is the parties' Stipulation to Confirm Arbitration Award, to Lift Sanctions in October 17, 2019 Order of Contempt (Dkt. 44), and of Dismissal Pursuant to Rule 41(a)(1)(A)(ii), which Attorney Wood and I have executed on behalf of our respective clients.

I am filing this letter and the enclosed stipulation as an unopposed motion and request that the Court enter the Stipulation as an Order of the Court.

Thank you for Your Honor's attention to this matter.

Respectfully submitted,

Peter C. Buckley

PCB:ad
Enclosure

cc: Robert Wood, Esquire (rwood@rwoodlaw.com)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THRIVEST SPECIALTY FUNDING, LLC	:	
	:	
v.	:	Civil Action No. 2:18-CV-1877
	:	
WILLIAM E. WHITE	:	

STIPULATION TO CONFIRM ARBITRATION AWARD, TO LIFT SANCTIONS IN OCTOBER 17, 2019 ORDER OF CONTEMPT (DKT. 44), AND OF DISMISSAL PURSUANT TO RULE 41(a)(1)(A)(ii)

The undersigned counsel for Thrivest Specialty Funding, LLC and William E. White hereby stipulate that the Final Award of Arbitrator Nancy F. Lesser in Thrivest Specialty Funding, LLC v. William White, AAA No. 01-18-0001-4765, attached as Exhibit A, be and is CONFIRMED pursuant to 9 U.S.C. §9. Mr. White having satisfied the Final Award on November 13, 2019, the undersigned counsel further stipulate to dismissal of this action pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure and to lift the sanctions contained in paragraph 5 of the Court's October 17, 2019 Order of Contempt (Dkt. 44). Mr. White may serve this Order on any financial institutions, banks, persons, or other entities that have frozen his accounts to advise them that the sanctions have been lifted.

THRIVEST SPECIALTY FUNDING, LLC

Peter C. Buckley, Esquire
Fox Rothschild LLP
2000 Market Street, 20th Floor
Philadelphia, PA 19103

WILLIAM E. WHITE

Robert C. Wood, Esquire
Wood Law Limited
68 North High Street, Building B, Suite 202
New Albany, OH 43054

SO ORDERED:

BRODY, J.

EXHIBIT "A"

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration
Under AAA Commercial Arbitration Rules and Mediation Procedures
Amended and effective October 1, 2013

THRIVEST SPECIALTY FUNDING, LLC
Claimant
Represented by Peter Buckley of Fox Rothschild, LLP

v. No: 01-18-0001-4765

WILLIAM WHITE,
Respondent
Represented by Robert Wood of Wood Law Limited

FINAL AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement contained in the document entitled "Non-Recourse Finance Transaction (Sales and Purchase Agreement)" (hereinafter, "Agreement") dated December 8, 2016 entered into by the above-named parties, Thrivest Specialty Funding LLC ("Claimant" or "Thrivest"), and William E. White ("Respondent" or "White") make the following Final Award:

I. PROCEDURAL HISTORY

This dispute has a complex procedural history involving both the federal district court and the Third Circuit, with which the parties are very familiar. In the interests of economy, I will not recite that history, or the dealings between the parties prior to the initiation of this proceeding, except to the extent it is relevant to the substantive discussion of the issues.

As for this arbitration proceeding, on April 11, 2018, Claimant filed with the American Arbitration Association ("AAA") a "Demand for Arbitration and Application for Emergency Relief" against Respondent. After the related federal court proceedings, Claimant's Demand was amended as a "Final Demand" on May 8, 2019 ("Demand").

In its Demand, Thrivest sought a declaratory award that Thrivest's Agreement with White was valid and enforceable. Thrivest also sought monetary relief for White's alleged breach of the Agreement, including attorneys' fees and costs. Lastly, Thrivest sought an emergency award directing White to escrow funds flowing to White from his participation in the NFL Concussion Class Action (the "Settlement") pending final award.

White filed an Answering Statement on May 15, 2019, asserting that AAA did not have jurisdiction over this dispute because Thrivest had allegedly refused a voluntary resolution of the dispute, as required by Section 6(z) of the Agreement. White also asserted several substantive defenses, denying liability to Thrivest in any amount.

An emergency arbitrator, Judge Steven Platt, was appointed. After a hearing and other proceedings, the emergency arbitrator concluded in his Emergency Award of June 4, 2019 that Thrivest had substantially complied with the notice and mediation requirements in the Agreement, and that the AAA properly could exercise jurisdiction over the case.

As to the merits of the request for emergency relief, Judge Platt determined that Thrivest had sustained its burden of demonstrating ongoing, irreparable harm in the form of dissipation of Settlement funds distributed to White. Judge Platt ordered White to deposit into escrow the sum of $1,250,000. To date, White has not complied with that order.

I was appointed the arbitrator in this matter on July 25,2019. At the scheduling conference, both parties agreed that an evidentiary hearing was unnecessary, and that all disputed legal issues and evidence would be submitted to me on the papers for final decision. The parties simultaneously filed their opening briefs and evidence on September 16, 2019, and their opposition briefs and evidence on September 30, 2019. Oral argument was held on October 8,

2019. Following oral argument, both parties made additional submissions, and the record was then closed on October 14, 2019.

II. THE AGREEMENT BETWEEN WHITE AND THRIVEST

A former NFL player, White was diagnosed with ALS in October 2016. At the time, White owed the IRS nearly $200,000.00 in unpaid taxes. Because of his health issues and years of service in the NFL, White qualified for a Settlement payment of $3.5 million. However, the processing of White's claim would take time, and so White entered into negotiations with Thrivest to obtain an advance of funds prior to his receipt of Settlement payments in order to satisfy his IRS obligations. Ultimately, Thrivest and White entered into the Agreement at issue. Thrivest paid White $500,000.00, a portion of which was used to satisfy White's IRS obligations. White received his Settlement payment in full but has not to date repaid Thrivest any amounts claimed to be owed.

Prior to execution of the Agreement, Thrivest sought medical information regarding White, to confirm White's diagnosis and capacity to make independent legal and financial decisions. Thrivest requested the opinion of White's treating neurologist at Ohio State, Dr. Kevin Weber. Dr. Weber confirmed, in a "Statement of Medical Competency" the diagnosis of ALS. In his statement, Dr. Weber also stated that in his professional opinion, the disease "in no way impaired [White's] ability to make his own legal, medical, and financial decisions."

There are several provisions of the Agreement relevant to the discussion.

The Agreement in its preamble is characterized as a "Purchase Agreement," and recites that "In consideration for the purchase of the TSF Distribution, [Thrivest] agrees to pay [White] the sum of $500,000.00." (Agreement p. 1).

The preamble states that "Whereas the parties agree that this sale is without recourse against [White]...This means that in the event that the Buyer does not receive the full TSF Distribution as agreed upon in the Agreement, the Seller shall have no personal obligation to the Buyer to pay any portion of the TSF Distribution that is not received by the Buyer." (Agreement p. 2).

The Agreement defines White's anticipated financial award from the NFL Concussion Class Action in the amount of $3,500,000 as the "Distribution." (Id. at p. 1).
In the Agreement, White as Seller "agreed to assign and sell, and Buyer [Thrivest] has agreed to acquire and purchase, pursuant to the terms of this Agreement, all rights, title, benefits, and interests of Seller in and to the Distribution ... until Buyer has collected $500,000.00 plus a 19% per annum investment return thereon accruing and compounding monthly." This is defined in the Agreement as the "TSF Distribution.". (Id. at p. 1).

Section 1 of the Agreement recites that White agreed to "sell and assign to [Thrivest], his...interest in the TSF Distribution and any future payments made in satisfaction of the TSF Distribution" in exchange for the $500,000 payment.

In Section 2(a), White agreed that he "absolutely assigns, conveys, sells, sets over, transfers, and warrants to Buyer all rights, title, benefits, and interests of Seller in and to:

> (i) The TSF Distribution. all rights to payment of or on account of the TSF Distribution, and all proceeds of Distribution until Buyer has collected the TSF Distribution; and
>
> (ii) All rights of Seller to ask for, demand, sue for, collect, receive, and enforce payment of the Distribution and to enforce all other covenants and obligations in connection with the Distribution payable to Seller, and the rights and remedies of Seller, in respect of the Distribution, until Buyer has collected the TSF Distribution (collectively. the "'Purchased Property"), in each instance free and clear of all claims, liens, interests and encumbrances (collectively, "Adverse Interests"). (Agreement p. 3).

Section 2(c) states that White's obligation to transfer the TSF Distribution to Thrivest "within three (3) business days" arises upon White's "collection and receipt ... of any Distribution." (Id.)

In Section 2(g) of the Agreement, White agreed to "pay to [Thrivest] the TSF Distribution as set forth in [the] Agreement ... and that payment shall be made to [Thrivest] from any funds received in full or in partial satisfaction of the Distribution ... before any payment is made from the Distribution to [White], or any other person." (Agreement at p.4).

Section 2(j) provides that "if the Distribution amount is less than the anticipated amount and is insufficient to pay [Thrivest] the TSF Distribution, then [Thrivest] will be limited to the lesser Distribution received with no recourse to [White] for any remaining balance." (Agreement p. 4). Likewise, Section 2(k) states that if White recovers no money from the Distribution, he "shall owe nothing" to Thrivest. (Id.)

Section 2(l) provides that in the event White's award is insufficient to pay the TSF Distribution, Thrivest is "entitled to recover any balance due, after the Award Amount has been distributed, from any related actions, including, but not limited to, any Federal or State causes of actions relating to, or in connection with, [White's] Claim and/or derivative claim." (Id.)

Section 6(b) states in relevant part that "The parties to this Agreement acknowledge (i) the Buyer is in no way acquiring the Seller's right to sue in regard *[sic]* the Settlement," that "the Seller or other class representative has already made the claim in the Settlement and the claim in the Settlement has been settled," and lastly that "Seller and Buyer acknowledge Buyer will in no way be involved in or influence the decisions Seller and its

attorney make in connection with the Seller's claim and that the right to make those decisions remains solely with Seller and Seller's attorney." (Agreement at p.7).

Section 6(h) is a severability clause, providing that "If any provision of this Agreement is held to be illegal, void or unenforceable, such provision shall be of no force or effect. However, the illegality or unenforceability of such provision shall have no effect upon, and shall not impair the legality or enforceability of, any other provision of this Agreement." (Agreement at p. 8).

In Section 5(d), White agreed that "If Seller breaches this Agreement, Seller shall pay to Buyer all costs and expenses incurred by Buyer (including reasonable attorney's fees) paid to enforce the terms of the Agreement." (Agreement p. 7). Section 6(z) states that "The cost of the arbitration proceeding shall be borne by the unsuccessful party to the arbitration". (Agreement p. 10).

III. THE PARTIES' ARGUMENTS

Thrivest's affirmative case is easily summarized. Thrivest argues that in Section 2(c) of the Agreement, White promised to provide the TSF Distribution to Thrivest within three business days of receiving his Distribution from the Claims Administrator. White's receipt of a $3.5 million award in the NFL Concussion Class Action triggered that obligation. White has failed to deliver the TSF Distribution as promised, and thus has breached the Agreement, warranting a monetary award in Thrivest's favor in accordance with the schedule in Exhibit B to the Agreement. Thrivest also asserts it is entitled to recover all its costs and expenses, including reasonable attorney's fees, expended to enforce the terms of the Agreement.

White, however, raises a number of arguments in defense that require more

extended discussion. [1]

A. Do the AAA Consumer or Commercial Rules Apply?

White asserts that Thrivest improperly filed its Demand under the Commercial Rules of the AAA instead of the Consumer Rules, and thus this entire proceeding is void. White argues that under the Consumer Rules and related Due Process Protocol, White would be afforded significant consumer protections unavailable under the Commercial Rules, such as extensive notice and disclosure requirements, as well as the mandates that the forum be convenient to the consumer and that Thrivest be responsible for most of the costs of the proceeding.

Thrivest asserts that White has waived this argument by his conduct in this proceeding and second, that in any event White is in error with respect to the applicability of the Consumer Rules.

First, I find that White is too late in raising this argument. The Demand for Arbitration was first filed on April 11, 2018 and invoked the Commercial Rules. The emergency arbitrator was appointed by AAA pursuant to Rule 38 of the Commercial Rules without objection by White to the applicability of those rules.

The emergency arbitrator conducted extensive proceedings pursuant to the Commercial Rules and issued his award pursuant to Commercial Rule 38. At no point in the proceedings did White challenge the applicability of the Commercial Rules.

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[1] Although White's counsel raised in the preliminary conference the issue of AAA jurisdiction that was considered and rejected by the emergency arbitrator, White has not addressed that issue in his final briefing and argument, although the Scheduling Order expressly permitted him to do so. In any event, I have thoroughly reviewed the emergency arbitrator's findings and reasoning and agree with his conclusion that the parties are properly before the AAA.

White's argument comes far too late in the day. White makes no argument that the delay in raising this issue was excusable. To now hold that the entire course of proceedings in this matter beginning in April of 2018 are null and void would work extreme unfairness on Thrivest. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Dill*, 108 A.3d 882, 886 (Pa. Super. 2015) ("waiver rules apply to arbitration hearings with the same force as they do to any other adversarial proceeding").

Putting the issue of waiver aside, I conclude that in fact the Consumer Rules are not the appropriate rules to apply in this matter. Importantly, the Agreement does not specify which set of rules should apply. Thus, there was nothing inherently improper with respect to Thrivest's invocation of the Commercial Rules.

White cites to the preamble to the Consumer Rules which list "legal funding" as one type of consumer action to which the Consumer Rules "typically" would be applicable. However, White neglects to quote the following language:

> The AAA defines a consumer agreement as an agreement between an individual consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices . The product or service must be for personal or household use. R-1, AAA Consumer Arbitration Rules.

That description simply does not fit the Agreement in this matter. White was not the purchaser of a standardized, consumable good or service. Rather, this was a significant monetary transaction in which an ordinary consumer would never engage. The Agreement is not a simple form contract. Indeed, the Agreement contains a notice to White that "This is a complex financial transaction." There was no evidence or argument that the Agreement was

presented to White as a take it or leave it form agreement.

Significantly, at the time he entered into the Agreement, White was represented in the NFL class action by his attorney Mr. Wood. Although White now states that Mr. Wood was not representing him in this transaction, the record reflects that White copied Mr. Wood on at least one communication with Thrivest regarding the proposed transaction. (Exhibit B to Thrivest Opening Brief). The record also reflects that Mr. Wood was assisting White with his IRS difficulties. (Id.) I also note that Mr. Wood provided the necessary notarizations for this Agreement. Thus, White had the opportunity, at the very least, to seek legal advice regarding the Agreement. Indeed, in the Agreement itself, White was advised to discuss the matter with an attorney prior to execution. No such clauses appear in a typical consumer agreement.

Another significant factor is the non-recourse nature of the Agreement. If, for whatever reason, White did not receive his settlement proceeds, Thrivest could not recover against White. Likewise, if White's settlement proceeds were less than anticipated, Thrivest was without any remedy against White to collect the balance of the purchase price. This is a very different scenario than a typical consumer transaction, which is typically recourse against the consumer.

Lastly, any suggestion that White was not competent to sign such an agreement and thus required the type of disclosures called for in the Consumer Rules is belied by the fact that his physician certified that he had no cognitive impediment at the time the Agreement was entered into. The correspondence in the record from Mr. White to Thrivest makes clear that he had the ability to understand the nature and details of the transaction. There is no evidence in the record to the contrary.

B. Is the Agreement Enforceable or Void as a "True" Assignment?

White argues that the Agreement is an impermissible assignment of White's rights to the Settlement proceeds and thus unenforceable pursuant to the Third Circuit's opinion in *Thrivest v. White*, 923 F.3d 96 (3d Cir. 2019).

In its opinion, the Third Circuit struck portions of the District Court's opinion that had voided cash advance agreements to the class members in their entirety. The Court of Appeals concluded that the District Court had exceeded its authority in so ruling.

The Third Circuit agreed with the District Court that, to the extent that the cash advance agreements were "true" assignments allowing the lender to step into the shoes of the player and seek funds directly from the Settlement fund, those agreements were void *ab initio* in light of the anti-assignment provision in the NFL Settlement agreement.

The Third Circuit concluded, however, that the District Court went beyond its authority when it voided the entirety of the cash advance agreements. As the Court noted, "some of the agreements contained severance clauses or alternative loan agreements, and there is a dispute as to whether the purported assignments … were true assignments at all. Accordingly, there are portions of the cash advance agreements that may be enforceable even after any true assignments are voided." (Id. at 111).

The Court also noted that "something less than a true assignment" might not affect the administration of the Settlement. (Id). The Court stated that it expressed "no opinion as to the ultimate enforceability of any of the cash advance agreements", noting that "a court or arbitrator will need to address whether any individual agreement contains a true assignment and whether there remain enforceable rights under the agreement after any true assignment is voided." (Id. at

112).

The Third Circuit opinion also stated that "Under the agreements entered into by the Atlas entities and Thrivest, the funding companies obtained no right to submit a claim directly to the Claims Administrator and instead acquired only the right to receive settlement funds after the Claims Administrator had paid out the awards to the particular class members with whom they contracted." (Id. at 100). In addition, the Court concluded that Thrivest's contract with White "gave it only the right to receive settlement funds after the funds are disbursed to a class member" after the District Court's power over the funds ends. (Id. at 112). The Court went on to say that "Even if the parties had attempted a true assignment, we have held that the District Court did not have the authority to void Thrivest's agreement with White in its entirety." (Id. at 112-113).

White first argues that, contrary to Thrivest's arguments, the Third Circuit did not in fact conclude that the Agreement is enforceable, pointing to the other language in the opinion that the Court was not undertaking that analysis with respect to any particular agreement.

White also asserts that the Court failed to consider Section 2(a) of the Agreement, discussed below, which White argues creates an impermissible "true" assignment. White points first to the language in Section 2(a)(i), which states that "Seller absolutely assigns, conveys, sells, sets over, transfers, and warrants to Buyer all rights, title, benefits, and interests of Seller" in the TSF Distribution. This provision, according to White, demonstrates a full assignment of all rights to Thrivest.

White also relies on Section 2(a)(ii), which provides that White agreed to convey to Thrivest "All rights of Seller to ask for, demand, sue for, collect, receive, and enforce payment

of the Distribution…" According to White, this provision likewise establishes that the Agreement is a true assignment. White argues that this language would permit Thrivest to step into White's shoes with a "concurrent" right to submit a claim and collect payments from the Claims Administrator directly.

White denies that Section 2(c) of the Agreement limits in any way Thrivest's assignment rights, since, according to White, it merely provides a timeframe for the funds to be disbursed to Thrives irrespective of who has the right to collect the funds.

Turning first to the Third Circuit's opinion, the Court has found that the Agreement vests assignment rights in Thrivest only following White's receipt of the Distribution. As noted above, the Third Circuit stated that "Under the agreements entered into by…Thrivest, the funding companies obtained no right to submit a claim directly to the Claims Administrator and instead acquired only the right to receive settlement funds after the Claims Administrator had paid out the awards to the particular class members with whom they contracted." 923 F. 3d at 101. The Court compared Thrivest's agreement with that of another funder, which "purported to obtain both the right to collect directly from the Claims administrator and the right to collect after the award was paid out to the class member." In the opinion, the Court later wrote, "Thrivest's contract gave it only the right to receive settlement funds after the funds are disbursed to a class member, and the District Court's power over the funds and class ends at that point." (Id. at 112).

That language could not be clearer. While there is other language in the Court's ruling that it was not expressing an opinion as to the ultimate enforceability of the cash advance agreements, and that "a court or arbitrator subsequently adjudicating these issues will need to

address whether any individual agreement contains a true assignment and whether there remain enforceable rights under the agreement after any true assignment is voided." (Id. at 112), that language does not negate the Court's unambiguous reading of this Agreement.

I agree with White that the Court did not come to any conclusion as to whether the Thrivest agreement was ultimately *enforceable*. What the Court did conclude, however, was that Thrivest's rights under the Agreement were only triggered after the funds were distributed to White.

As the Court recognized, there were a number of other defenses that could be raised by class members to enforcement of the funding agreements, such as the issue of capacity. Such defenses would need to be individually adjudicated by a court or arbitrator. (Id). The Court stressed that one or more of those defenses might render a cash advance agreement unenforceable. That observation applied to the Agreement here as well.

With respect to the "true" assignment issue, the Court noted that there were other funding agreements—as it noted earlier, between "dozens of litigation funding companies" and class members- that would require particularized analyses as to their assignment language. (Id) In context, it appears that the Court's discussion regarding a court or arbitrator passing on whether there was a "true" assignment referred to these myriad other agreements. I do not read that language as a holding that the Court's interpretation of the Thrivest assignment was open to reconsideration by another tribunal.

However, this award does not rest on the Third Circuit's conclusions, I have independently analyzed the Agreement, and my conclusions regarding the proper interpretation of the Agreement are in accord.

White argues that the Agreement's assignment provisions are broad enough to have included Thrivest's right to step into White's shoes and make a claim directly against the

Settlement fund, and thus the Agreement is void under the Third Circuit's ruling. I disagree.

While certain provisions appear to vest broad rights in Thrivest, other provisions limit those rights in significant ways. White relies on the language in 2(a) to the effect that Thrivest in the Agreement obtained "all rights" of White to the Distribution and the TSF Distribution, and "all rights" of White to enforce payment of the Distribution. White argues that given these provisions, Thrivest had the right to collect payment directly from the Settlement fund and thus the entire Agreement is void.

However, Section 2(c) provides that within three days after White's "collection and receipt…of any Distribution," White is obligated to provide such funds to Thrivest. Section 2(c) therefore places a significant limitation of Thrivest's rights to collect under the Agreement. White's obligation to repay Thrivest arises only *after* White has obtained proceeds from the Settlement fund. Although White argues that 2(c) only provides a "timeline" for payment and does not affect Thrivest's substantive rights, there is no support textually for such an interpretation. Section 2 (c) clearly limits Thrivest's right to collect only after White obtains his Settlement proceeds.

This interpretation is strongly bolstered by other provisions in the Agreement. Section 6(b) of the Agreement provides explicitly that Thrivest had no right to sue in connection with the Settlement, and that it would have no participation in White's decisions with respect to the Settlement. Had the Agreement intended to vest broad rights in Thrivest to step into White's shoes for the purpose of either the prosecution of his claim or the collection of his Settlement proceeds, the language in Section 6(b) would not have been included.

Similarly, in the event White's award is insufficient to pay the TSF Distribution, Thrivest is "entitled to recover any balance due, *after the Award amount has been distributed*, from any related actions, including, but not limited to, any Federal or State

causes of actions relating to, or in connection with, [White's] Claim and/or derivative claim." (Agreement, Section 2(l), emphasis supplied). Thus, Thrivest's rights to pursue any of White's claims only vests *after* White receives his Distribution, and not before.

Alternatively, pursuant to the severability provision in Section 6(h) of the Agreement, the assignment language of Section 2(a) could be deleted entirely and Thrivest would still have a fully valid Agreement. Severability provisions are enforceable under Pennsylvania law if, as here, the primary purposes of the contract will not be impaired. See, e.g., *Martini v. Rocco*, 2019 Phila. Ct. Com. Pl. LEXIS 58 (June 11, 2019) and cases cited therein. Thus, to the extent any provision of the Agreement could be read as vesting Thrivest with untrammeled assignment rights before Settlement distribution, such provisions could be voided without harm to either party's fundamental rights and obligations under the Agreement.

As discussed above, Section 2(c) is not simply a "timeline," but a substantive provision giving Thrivest collection rights post-distribution in accordance with the Agreement. Moreover, Section 2(g) accomplishes the same even more clearly: "Seller agrees that it shall pay Buyer the TSF Distribution as set forth in this Agreement and reflected accurately in the Disclosure Statement…" Such provisions are not dependent on any arguable pre-distribution assignment rights transferred to Thrivest. I do not, however, find it necessary to void any provisions as the Agreement itself is not a "true" assignment as defined by the Third Circuit.

Accordingly, I find that the Thrivest Agreement is valid and enforceable, and that White has been in breach of the Agreement by his continuing failure to transfer the TSF Distribution following receipt of his $3.5 million award.

C. Is Thrivest Entitled to an Award of Fees and Costs?

Under Section 5(d) of the Agreement, Thrivest is entitled to reimbursement of its costs and expenses, including reasonable attorneys' fees, in the event of a breach by White. As I have concluded that the Agreement is valid and enforceable and that White breached the Agreement, this Award shall include those reasonable fees and costs.

White argues that Thrivest's claim for attorneys' fees is unreasonable. First, White asserts that because Thrivest has at least 34 other transactions with other class members, White is being asked to "pay the freight" for Thrivest's other collection actions.

Second, White argues that Thrivest lost virtually all of the arguments it raised in the Third Circuit appeal and so should not be reimbursed for those efforts.

White also faults Thrivest for refusing to participate in the Third Party Resolution Funding Protocol, which allowed funders to recover the cash advance plus 10% interest.

Lastly, White asserts in his reply brief that the Agreement is unconscionable considering the significant repayment amounts that have accrued over the last three years.

I find that Thrivest's application for fees and costs to be reasonable considering the significant efforts Thrivest has been forced to undertake to enforce the Agreement. There has been no challenge by White to the hourly rates charged by Thrivest's counsel or the amount of time incurred for any particular task. There is no evidence within the attorney invoices provided or elsewhere that Thrivest has sought to charge White with fees incurred in connection with any other class member. The Third Circuit in its opinion specifically noted that Thrivest "expressly limited its appeal to class member White."

Although White argues that Thrivest failed to prevail in the Third Circuit, nothing could be further from the truth. Thrivest was able to obtain a significant reversal of the District Court's ruling, which had voided the Agreement in its entirety. Moreover, as discussed above, the Third

Circuit read the Agreement consistent with Thrivest's argument that its assignment rights only vested following White's receipt of the Settlement proceeds. Thrivest obtained a significant victory in the Third Circuit.

With respect to the Third Party Funding Resolution Protocol, Thrivest's decision not to settle its claims on the terms offered there does not vitiate its contractual right to interest, fees and costs. There was no requirement in the Agreement or by court ruling that it do so. Indeed, it was White who refused Thrivest's offer to stop the clock on interest, fees and costs if White would agree to an escrow arrangement pending the appeal (Thrivest Opening Brief, Ex. K).

As to White's assertion of unconscionability, White provides not a single case citation or other authority suggesting that the Agreement should be considered unconscionable or in bad faith. As discussed above, this was not a form consumer agreement. This was not a contract of adhesion. The terms of the Agreement, including the repayment terms, were clearly stated in the Agreement. White had access to counsel who surely could have provided advice as to whether White should enter into the Agreement and on what terms. There is significant evidence establishing that White was competent to enter into the Agreement, and White has introduced no evidence to the contrary.

The Agreement was also not one-sided in Thrivest's favor. Thrivest took the significant risk that if White obtained no settlement proceeds, or proceeds of less than the anticipated amount, Thrivest had no recourse against White for any amounts above and beyond what White received. It is undisputed that the Agreement does not violate any applicable consumer usury laws. As Thrivest has noted, there are credit cards that charge greater than the 19% charged here

by Thrivest. The amount now owed by White is not so large as to shock the conscience of this tribunal. [2]

D. White's Failure to Comply with Prior Orders

Thrivest has sought a variety of sanctions against White for disregard of my order of August 30, 2019 requiring White to produce information and documents. White has offered no excuse for his failure to comply, or his earlier failure to abide by the Emergency Award. Pursuant to the Commercial Rules, sanctions are certainly available as a remedy. However, in this case, my decision on the merits of the dispute subsumes any sanction that could otherwise be imposed, and so no additional award is necessary.

IV. FINAL AWARD

Accordingly, for all the reasons stated above, the Arbitrator rules as follows:

1. Respondent shall pay Claimant the sum of $880,194.29, for past due sums owed to Claimant pursuant to Schedule B of the Agreement entered into between the parties.

2. Respondent shall pay Claimant in addition the sum of $301,679.59 for its reasonable fees and costs incurred in the enforcement of the Agreement.

3. The administrative fees and expenses of the American Arbitration Association totaling $11,700 shall be borne 100% by Respondent, and the compensation and expenses of the Arbitrator totaling $31,865 shall be borne 100% by Respondent. Therefore, Respondent shall reimburse the sum of $41,465, representing that portion of said fees and expenses in

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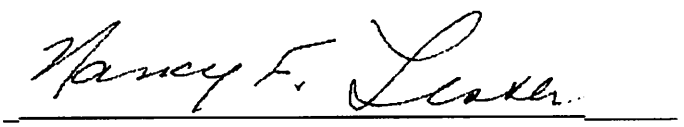
[2] White has also asserted that because the District Court initially ruled that the entire Agreement was void, and because there had been no court or arbitral decision prior to this award holding that White had breached an enforceable agreement, that the clock should not have been running on interest, fees, and costs. White cites no case or other authority for this proposition. There is no requirement in the Agreement or under the law that there be a legal determination of breach before a party can collect interest, fees and costs, or that an interim decision by a trial court (later overturned by a higher court) should stop the clock for purposes of accrual.

excess of the apportioned costs previously incurred by Claimant.

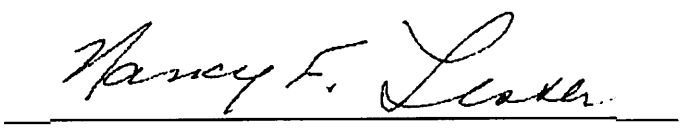
4. The above sums are to be paid by Respondent on or before 10 days from the date of this Award. Interest shall run on any unpaid sums thereafter at the amount specified in the Agreement.

5. This Award is in full settlement of all claims, counterclaims and defenses submitted to this Arbitration. Any claim, counterclaim, defense, motion, objection, argument or defense not expressly granted herein are hereby, denied.

November 11, 2019 

Nancy F. Lesser

I, Nancy F. Lesser, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

November 11, 2019 

Nancy F. Lesser