[DO NOT PUBLISH]

# In the United States Court of Appeals

## For the Eleventh Circuit

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No. 21-12111

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ACHERON PORTFOLIO TRUST,
AVERNUS PORTFOLIO TRUST,
LORENZO TONTI 2006 TRUST,
STYX PORTFOLIO TRUST,
ACHERON CAPITAL, LTD.,

Plaintiffs-Appellants,

*versus*

BARRY MUKAMAL,
as Trustee of the Mutual Benefits Keep Policy Trust,

Defendant-Appellee.

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Appeal from the United States District Court
for the Southern District of Florida

D.C. Docket No. 1:20-cv-25025-DPG

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Before WILLIAM PRYOR, Chief Judge, JILL PRYOR, and GRANT, Circuit Judges.

PER CURIAM:

Plaintiffs the Acheron Trusts and Acheron Capital (collectively, "Acheron") appeal the district court's dismissal of their petition to compel defendant Barry Mukamal, as Trustee of the Mutual Benefits Keep Policy Trust, to arbitrate their dispute regarding the management of the trust. In dismissing the petition, the district court concluded that (1) it was for the court, not the arbitrator, to decide the gateway question of arbitrability and (2) the parties' dispute was not subject to arbitration. After careful review and with the benefit of oral argument, we affirm.

## I. BACKGROUND[1]

In 2004, the Securities and Exchange Commission brought an enforcement action against Mutual Benefits Corporation for

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[1] Because we write for the parties, we assume their familiarity with the facts and issues and include only what is necessary to explain our decision.

fraudulently selling fractional investment interests in viaticated life insurance policies. *See SEC v. Mut. Benefits Corp.*, 408 F.3d 737, 738 (11th Cir. 2005). As a result of this enforcement action, the viaticated life insurance policies were placed into a receivership. Investors were given the option of retaining or selling their interests in the policies. The retained policies were ultimately transferred into the Mutual Benefits Keep Policy Trust for which Mukamal (the "Trustee") acts as trustee. Appellants the Acheron Trusts[2] own fractional interests in these policies.

When the trust was formed, the Trustee entered into a servicing agreement (the "Litai Agreement") with third party Litai Assets to service the policies. Under the servicing agreement, Litai was responsible for performing various tasks related to the policies. It tracked when premiums were due on the policies, collected the funds needed to pay the premiums, and paid the premiums as they came due. It also maintained updated information about the whereabouts of the insureds under the policies to determine whether each insured remained alive. When an insured died, Litai would submit a claim to the relevant insurer to collect the benefits owed under the insurance policy and distribute the benefits to those individuals or entities, like the Acheron Trusts, who owned fractional interests in the policy. Servicing of fractional interests in

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[2] The Acheron Trusts include the Acheron Portfolio Trust, Avernus Portfolio Trust, Lorenzo Tonti 2006 Trust, and Styx Portfolio Trust. Appellant Acheron Capital is the investment manager for each of the Acheron Trusts. Acheron Capital does not itself own interests in the policies.

life insurance policies is complex and not routinely offered by life insurance servicers. To accomplish its servicing obligations, Litai relied on specialized software to support its administration of the policies.[3]

Aware of the complex nature and demands of servicing fractional interests in life insurance policies, Acheron Capital entered into an agreement with the Trustee in 2015 (the "2015 Agreement") to protect its interests going forward. The 2015 Agreement gave Acheron Capital the right to participate in the negotiation of any new "servicing agreement" and the power to refuse to approve any new servicing agreement that was not "commercially reasonable." Doc. 1-4 at 2–3.[4] The 2015 Agreement provided that if the Trustee and Acheron Capital were "unable to agree with respect to the terms of a new servicing agreement or further extension of the existing Servicing Agreement," they would mediate their dispute. *Id.* at 3. If they did not resolve their dispute in mediation, they agreed that the dispute would be "submitted to JAMS, or its successor, for final and binding arbitration." *Id.* Under the 2015 Agreement, either party could initiate arbitration by "filing a written demand for arbitration at any time following the declaration of an impasse by the mediator." *Id.* The only other reference in the agreement to JAMS says that "[a]t no time prior [to the declaration

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[3] Litai did not develop the software. The receiver originally paid a separate entity to develop the software, and later sold it to Litai.

[4] "Doc." numbers refer to the district court's docket entries.

of an impasse] shall either side initiate an arbitration or litigation related to this Agreement except to pursue a provisional remedy that is authorized by law or by JAMS Rules or by agreement of the parties." *Id.*

When the Litai Agreement expired, the Trustee selected another entity—Q Capital—to succeed Litai as the servicer of the policies. In connection with his selection of Q Capital as the new servicer, the Trustee contracted with Proactive Technologies ("ProTech") to provide software that Q Capital would use for servicing the fractional interests (the "ProTech Agreement"). Unlike the negotiations for the Q Capital servicing agreement,[5] Acheron was not included in the negotiations for the ProTech Agreement.

Acheron contended that, under the terms of the 2015 Agreement, it should have been included in the Trustee's negotiations with ProTech. In the instant dispute, Acheron filed a petition to compel arbitration of the dispute over the ProTech Agreement. The Trustee moved to dismiss Acheron's petition to compel arbitration. The matter was referred to a magistrate judge, who recommended that the motion be denied after concluding that (1) it was for the court, not the arbitrator, to decide whether the instant dispute was arbitrable and (2) the ProTech Agreement was not a servicing agreement subject to arbitration. The district court adopted the magistrate judge's report and recommendation and

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[5] Acheron refused to approve the Q Capital servicing agreement, triggering a separate dispute regarding the commercial reasonableness of that agreement.

dismissed Acheron's petition to compel arbitration.[6] This appeal followed.

## II. STANDARD OF REVIEW

"We review *de novo* a district court's decision on whether a dispute is covered by an arbitration agreement." *Int'l Underwriters AG v. Triple I: Int'l Invs., Inc.*, 533 F.3d 1342, 1344 (11th Cir. 2008); *see also Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351, 1354 (11th Cir. 2017) ("We review *de novo* a district court's denial of a motion to compel arbitration.").[7]

## III. DISCUSSION

We first consider whether the court or the arbitrator has the authority to decide whether a dispute is arbitrable under the 2015

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[6] The district court also concluded that the Acheron Trusts lacked standing because only Acheron Capital was a party to the 2015 Agreement containing the arbitration clause. Because Acheron Capital has standing to enforce the agreement, we need not and do not decide whether the Acheron Trusts have standing. *See Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1317 (11th Cir. 2021).

[7] Mukamal maintains that Acheron failed to properly object to the magistrate judge's report and recommendation and thus is entitled to plain-error review only. *See* 11th Cir. R. 3-1 ("A party failing to object . . . waives the right to challenge on appeal the district court's order . . . . In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."). Notably, when the district court reviewed Acheron's objections, it applied *de novo* review, suggesting it considered Acheron's objections to be sufficient. In any event, because the result we reach would be the same under either standard of review, we review *de novo*.

Agreement. Because we conclude that the question of arbitrability is for the court to decide, we next consider whether the district court erred in determining that the dispute over the ProTech Agreement is not subject to arbitration. We agree with the district court that the 2015 Agreement gives Acheron no right to arbitrate this dispute and thus affirm the court's denial of the motion to compel arbitration.

### A. Under the 2015 Agreement, the Court, not the Arbitrator, Decides Questions of Arbitrability.

We first address whether the court or the arbitrator decides the arbitrability of the instant dispute. The default rule is that courts decide questions of arbitrability. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide."). Parties can contract around this default rule by "clearly and unmistakably" providing that the arbitrator shall decide questions of arbitrability. *Id.* at 83; *see also JPay, Inc. v. Kobel*, 904 F.3d 923, 930 (11th Cir. 2018) ("Questions of arbitrability, then, stay with the court unless there is clear and unmistakable evidence that the parties intended to submit such questions to an arbitrator.") (internal quotation marks and emphasis omitted).

We therefore look to the 2015 Agreement to determine whether the parties expressed any such "clear and unmistakable" intent. Acheron argues that the 2015 Agreement's reference to JAMS, a mediation and arbitration organization, constitutes "clear

and unmistakable" evidence that the question of arbitrability belongs to the arbitrator. Unless the parties agree otherwise, JAMS applies the JAMS Comprehensive Arbitration Rules & Procedures ("JAMS Rules") to resolve disputes submitted for binding arbitration. Under the JAMS Rules, the arbitrator decides the gateway issue of arbitrability. By invoking JAMS and the JAMS Rules in the 2015 Agreement, Acheron argues, the parties clearly delegated the question of arbitrability to the arbitrator. Acheron acknowledges that the 2015 Agreement does not expressly incorporate the JAMS Rules or refer to any particular JAMS rule, but it nonetheless contends that reference to the JAMS Rules in general is sufficient to reflect the parties' agreement that the JAMS Rules will govern, including on the question of arbitrability. We disagree.

An arbitration agreement's incorporation of rules that specifically empower the arbitrator to decide questions of arbitrability constitutes "clear and unmistakable" evidence that the parties intended to submit such questions to the arbitrator. *See Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005). In *Terminix*, the parties expressly agreed that "arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the American Arbitration Association." *Id.* These rules in turn gave the arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *Id.* We held that by agreeing to arbitrate according to these rules, the parties "clearly and unmistakably" agreed to delegate this power to the

arbitrator. *Id.*; *see also JPay*, 904 F.3d at 937 ("[B]y incorporating AAA rules into an agreement parties clearly and unmistakably evince an intent to delegate questions of arbitrability.").

Acheron argues that the same principle applies here. But unlike the agreement in *Terminix*, which explicitly stated that arbitration would be conducted according to the AAA rules, no similar language appears in the 2015 Agreement with respect to the JAMS Rules. The 2015 Agreement provided only that the dispute "shall be submitted to JAMS" for arbitration and that, *before any arbitration has begun*, the parties may pursue a provisional remedy "authorized by law or by JAMS Rules or by agreement of the parties." Doc. 1-4 at 3. Despite calling for the submission of disputes that could not be settled in mediation to JAMS for arbitration, the 2015 Agreement did not say that the JAMS Rules would govern arbitration. Instead, it provided that a dispute would be submitted to JAMS for arbitration "pursuant to the provisions below," none of which incorporated the JAMS Rules. *Id.* The agreement's only reference to the JAMS Rules merely permitted the parties to commence provisional remedies *before* arbitration began. That the agreement invoked the JAMS Rules in this context but did not say they would govern the arbitration itself is strong evidence that the parties did not agree to be bound by the JAMS Rules generally.

We conclude that the references to JAMS and JAMS Rules in the 2015 Agreement did not amount to clear and unmistakable incorporation of the JAMS Rules. *See Dist. No. 1., Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n v. Liberty Mar. Corp.*, 998 F.3d 449,

462 (D.C. Cir. 2021) ("The parties' mention of the AAA in their agreement does not embody an incorporation of the AAA rules, let alone a clear and unmistakable incorporation."); *see also Terminix*, 432 F.3d at 1332 (finding incorporation of AAA rules where a contract explicitly provided that "arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the American Arbitration Association"); *U.S. Nutraceuticals, LLC v. Cyanotech Corp.*, 769 F.3d 1308, 1309–10 (11th Cir. 2014) (finding incorporation where parties agreed to arbitrate "under the auspices and rules of the American Arbitration Association"); *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230, 1235–36 (11th Cir. 2018) (finding incorporation where parties agreed to resolve disputes "by submission to arbitration . . . in accordance with the rules of the American Arbitration Association then in effect"). The cases Acheron cites to support its argument—that the 2015 Agreement's general reference to JAMS or the JAMS Rules suffices to incorporate the rules—involved express incorporation language akin to the language in the cases cited above and thus do not bolster its position.[8]

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[8] *See Green Tree Servicing, LLC v. House*, 890 F.3d 493, 496 (5th Cir. 2018) ("[A]ny controversy or claim arising out of or relating to this contract . . . shall be settled by binding arbitration in accordance with the Comprehensive Arbitration Rules and Procedures administered by [JAMS] . . . ."); *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 208 (2d Cir. 2005) ("[Any] controversy shall be determined by arbitration . . . in accordance with the Commercial Arbitration Rules of the American Arbitration Association . . . .").

Acheron also points to the JAMS Rules themselves. The rules provide that all disputes submitted to JAMS for arbitration will be governed by JAMS Rules even in the absence of an agreement by the parties to apply those rules.[9] If the parties had incorporated the JAMS Rules, we would look to the content of those rules for evidence of the parties' intent to delegate the issue of arbitrability. But, as discussed above, the 2015 Agreement did not incorporate the JAMS Rules or otherwise reflect the parties' agreement to proceed according to those rules. Moreover, Acheron's argument is self-defeating: the JAMS Rule that provides that JAMS Rules are the default for claims over a monetary threshold[10] is premised on the parties having *not agreed* to use any particular

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[9] JAMS Rules 1(a) and 1(b) provide:

> (a) The JAMS Comprehensive Arbitration Rules and Procedures ("Rules") govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, any disputed claim or counterclaim that exceeds $250,000, not including interest or attorneys' fees, unless other Rules are prescribed.
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> (b) The Parties shall be deemed to have made these Rules a part of their Arbitration Agreement ("Agreement") whenever they have provided for Arbitration by JAMS under its Comprehensive Rules or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes or claims meet the criteria of the first paragraph of this Rule.

JAMS Comprehensive Arbitration Rules & Procedures (2021). These provisions have not materially changed during this litigation.

[10] *See id.* at 1(a).

rules. The absence of an agreement as to what rules to use cannot be clear evidence of an agreement to use JAMS Rules.

The critical question is whether the parties "clearly and unmistakably" agreed to submit the gateway question of arbitrability to the arbitrator. *See JPay*, 904 F.3d at 930. When arbitration rules are expressly incorporated into an agreement, we presume the parties considered the content of those rules and agreed to be bound by them. Mere mention of an arbitration body, without explicit incorporation of that body's rules, does not give rise to the same presumption. Here, the parties have not manifested an intent to be bound by rules outside the four corners of the 2015 Agreement. Absent such manifestation, we cannot say that the parties "clearly and unmistakably" agreed that JAMS Rules—including the rule making JAMS Rules the default where the parties fail to specify the rules under which the arbitration will be conducted—govern who will decide questions of arbitrability.

In sum, the 2015 Agreement does not contain the "clear and unmistakable" evidence necessary to overcome the presumption that the court, rather than the arbitrator, decides the gateway question of arbitrability. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (quotation and brackets omitted).

### B. The ProTech Agreement is Not a Servicing Agreement Subject to Arbitration.

We now address whether the instant dispute is arbitrable. Because we conclude the ProTech Agreement is not a "servicing

agreement" within the meaning of the 2015 Agreement, the parties' dispute over the ProTech Agreement is not subject to arbitration.

The parties agreed to arbitrate disputes relating to any new or existing "servicing agreement." Although the 2015 Agreement did not define "servicing agreement," the parties agree that the Litai Agreement was a servicing agreement. The parties also agree that we can look to the Litai Agreement to determine the meaning of "servicing agreement" as used in the 2015 Agreement.

A direct comparison of the obligations and duties set out in the ProTech and Litai Agreements reveals no overlap between the two. The Litai Agreement required Litai to provide a range of services including premium funds management, policy premium payment, accounting and reporting, insured tracking, death claim management, customer service functions, and services related to policy changes and disposition. Specifically, Litai tracked premium deadlines and collected funds to pay premiums on time. It also maintained updated information about each insured. When an insured died, Litai was responsible for submitting a claim to the relevant insurer, collecting benefits on the policy, and distributing those benefits to the owners of fractional interests in the policy. The ProTech Agreement, by contrast, requires ProTech to perform tasks related exclusively to the design, development, hosting, and maintenance of software that Q Capital would use to perform its servicing obligations.

Acheron argues that we should look instead to the functions performed by the ProTech software and compare them to the services Litai performed. By performing these functions, Acheron contends, the ProTech software makes it possible for Q Capital to fulfill its obligations as servicer. According to Acheron, because the ProTech software is essential for Q Capital to carry out its servicing obligations, the ProTech Agreement itself is a servicing agreement.

We are not persuaded that the functionality of the ProTech software transforms the ProTech Agreement into a servicing agreement. Under the agreement, ProTech is responsible for developing, hosting, and maintaining a software program. It is not responsible for managing the portfolio of policies, collecting funds to service the policies, or any of the numerous associated servicing tasks laid out in the Litai Agreement.

The fact that the ProTech software may be necessary for Q Capital to service the policies has no effect on ProTech's obligations or on the characterization of the ProTech Agreement. As the district court explained, Acheron's argument based on the centrality of the software "insufficiently limits the boundaries of what could be considered" a servicing agreement. Doc. 32 at 19; Doc. 37. The district court aptly observed that "employment contracts, office leases, and any number of contracts for services or tangible goods could be subject to arbitration as 'servicing agreements' using the logic that those contracts provide necessary products or services for a primary servicer to carry out its servicing responsibilities." *Id.* Regardless of the tools necessary for Q Capital to carry out

its servicing obligations, Q Capital—not ProTech—is responsible for servicing the policies.

Based on the lack of overlap between the obligations in the ProTech Agreement and the obligations in the Litai Agreement, as well as the fact that ProTech's software is merely a tool that a servicer uses to perform its servicing obligations, we conclude the ProTech Agreement is not a servicing agreement and thus not subject to arbitration.

## IV. CONCLUSION

For the reasons discussed above, we affirm.

**AFFIRMED.**