APPENDIX

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-60344

[Filed December 12, 2019]

In the Matter of: CHUCK WILLIS	)
	)
Debtor.	)
	)
TOWER LOAN OF MISSISSIPPI, L.L.C., Doing Business as Tower Loan of Crystal Springs,	)
	)
Appellant,	)
	)
versus	)
	)
CHUCK WILLIS,	)
	)
Appellee.	)
	)

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

Before OWEN, Chief Judge, SMITH and DENNIS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

In adversary bankruptcy proceedings, Chuck Willis sued Tower Loan of Mississippi, L.L.C. ("Tower Loan"), for allegedly violating the Truth in Lending Act ("TILA"). Tower Loan moved to dismiss or compel arbitration. The bankruptcy court denied the motion, and the district court affirmed. Tower Loan appeals. Because the parties reached a valid agreement to arbitrate and delegated threshold arbitrability issues to the arbitrator, we reverse and remand with instructions to refer this case to arbitration.

I.

This appeal centers on the relationship between two arbitration agreements that Willis signed in November 2016 when he borrowed money from Tower Loan via an Installment Loan Agreement and Disclosure Statement ("loan agreement"). The loan agreement showed that Willis had also purchased insurance policies; those policies were issued by Tower Loan subsidiaries. In signing the loan agreement, Willis agreed to an arbitration agreement found on its back side ("first arbitration agreement"). And in purchasing the insurance policies, Willis agreed to a separate arbitration agreement ("second arbitration agreement"). Though Tower Loan didn't sign the second agreement, a Tower Loan representative had handed it to Willis for his signature.[1]

[1] That fact is not in the record, but counsel for Tower Loan conceded at oral argument that a Tower Loan representative—and not a representative for the insurance companies—handed Willis the second arbitration agreement.

The two arbitration agreements are similar but not identical. Start with the similarities. Both broadly require arbitration for all disputes between and among Willis, Tower Loan, and the insurance companies, including any that arise from the loan or the policies. Each agreement binds Willis to arbitrate any dispute with Tower Loan's affiliates. Both delegate to the arbitrator the power to decide gateway arbitrability issues, including whether a given claim is covered. But the agreements conflict over several procedural aspects of the arbitration, relating mainly to the selection and number of arbitrators, time to respond, location, and fee-shifting.

In January 2017, Willis filed for Chapter 7 bankruptcy. About four months later, he sued Tower Loan in an adversary proceeding, alleging that the company had violated the TILA, 15 U.S.C. § 1601 *et seq.*, by providing inaccurate disclosures in the loan agreement. After answering, Tower Loan moved to dismiss or compel arbitration.

The bankruptcy court denied the motion. It held that the first and second arbitration agreements formed a single contract and that the conflicting provisions meant that Willis and Tower Loan hadn't formed a sufficiently definite contract to arbitrate under Mississippi law. The district court affirmed in a terse opinion that added nothing on the merits.[2] Tower Loan appeals, contending that the arbitration agreements should be construed separately and that

[2] Because the district court's opinion adopted the bankruptcy court's reasoning in its entirety, our references are to the bankruptcy court.

even if we construe them together, the parties still formed a valid contract.

II.

"We review *de novo* a ruling on a motion to compel arbitration" and follow "two analytical steps" in doing so. *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016). We first apply state law to determine whether the parties formed "*any arbitration agreement at all*." *Id.* Second, we interpret the contract "to determine whether *this* claim is covered by the arbitration agreement." *Id.* The second step is also ordinarily for the court. *Id.* But "the analysis changes" where the agreement delegates to "the arbitrator the primary power to rule on the arbitrability of a specific claim." *Id.* In such a case, we ask only whether there is a valid delegation clause.[3] If there is, then the *arbitrator* decides whether the claim is arbitrable. *Id.*

III.

The first question per *Kubala* is whether, as a matter of Mississippi law,[4] the parties created a valid contract to arbitrate. *Id.* That requires us to resolve two related issues. First, should the arbitration agreements be construed as one contract? Second,

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[3] Specifically, we ask whether the clause "evinces an intent to have the arbitrator decide whether a given claim must be arbitrated." *Kubala*, 830 F.3d at 202.

[4] Because the loan agreement has a choice-of-law provision for Mississippi, we apply the law of that state. *See Nethery v. CapitalSouth Partners Fund II, L.P.*, 257 So. 3d 270, 273 (Miss. 2018) (applying Delaware law per the contract's choice-of-law clause in reviewing motion compelling arbitration).

assuming we construe them together, did the parties have a meeting of the minds as to arbitration?

A. Contract Construction

The bankruptcy court construed the arbitration agreements together, noting that both cover *all* disputes between Willis and Tower Loan. Tower Loan contends that the agreements should be construed separately because Tower Loan assented only to the first arbitration agreement and not the second. The company suggests that because it did not sign or otherwise agree to the second, it cannot be considered a party to it. Hence, on Tower Loan's theory, only the first agreement applies.

We disagree. Under Mississippi law, "when separate documents are executed at the same time, by the same parties, as part of the same transaction, they may be construed as one instrument."[5] All of those requirements are met, so the bankruptcy court properly construed the agreements as one.

First, Tower Loan is a party to the second arbitration agreement just as it is to the first. Tower Loan conceded at oral argument that its representative handed Willis both arbitration agreements to sign. And the agreements are closely related. Each requires Willis to arbitrate any dispute involving Tower Loan.

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[5] *Sullivan v. Mounger*, 882 So. 2d 129, 135 (Miss. 2004); *accord Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990) ("Under general principles of contract law, separate agreements executed contemporaneously by the same parties, for the same purposes, and as part of the same transaction, are to be construed together.").

Both apply to all disputes that arise from the loan Willis received and the insurance he purchased. Moreover, the loan agreement—to which Tower Loan is indisputably bound—shows that Willis purchased the insurance policies that the company insists are part of an entirely separate transaction.[6]

Next, Tower Loan and Willis executed the two agreements at the same time and as part of the same transaction. As stated above, a Tower Loan representative handed Willis both agreements, and the loan agreement evidences both the loan and the insurance purchases. Accordingly, the arbitration agreements were "executed at the same time, by the same parties, as part of the same transaction." *Sullivan*, 882 So. 2d at 135. We construe them together.

B. Meeting of the Minds

Next, construing the agreements as one, we decide whether Willis and Tower Loan entered into a valid contract to arbitrate despite inconsistencies in the contractual terms.

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[6] On a related point, Tower Loan avers that the arbitration agreements are separate because Willis supposedly executed them for different purposes—the first to get a loan, the second to purchase insurance. We see it differently. As already noted, the loan agreement shows that Willis purchased the insurance. And each arbitration agreement states that it applies to any dispute arising from *both* the loan *and* the insurance. So, it makes little sense to say that the agreements were executed for different purposes.

1.

To form a contract, Mississippi law requires, among other things,[7] "mutual assent"[8] or a "meeting of the minds"[9] as to essential terms, as well as a contract that is "sufficiently definite" to "enable the court under proper rules of construction to ascertain its terms." *Leach v. Tingle*, 586 So. 2d 799, 802 (Miss. 1991). A "[d]etermination that an agreement is sufficiently definite is favored in the courts, so as to carry out the reasonable intention of the parties if it can be ascertained." *Jones v. McGahey*, 187 So. 2d 579, 584 (Miss. 1966). Thus, "[a] court will, if possible, interpret doubtful agreements by attaching a sufficiently definite meaning to a bargain if the parties evidently intended to enter into a binding contract." 1 WILLISTON ON CONTRACTS ("WILLISTON") § 4:21 (4th ed. 2019). Mississippi courts have not addressed whether conflicting terms in an arbitration agreement prevent a contract from forming.

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[7] Mississippi law also requires that there be multiple contracting parties with legal capacity, consideration, and no "legal prohibition precluding contract formation." *See GGNSC Batesville, LLC v. Johnson*, 109 So. 3d 562, 565 (Miss. 2013). Willis and Tower Loan don't dispute that those elements are met.

[8] *GGNSC Batesville, LLC*, 109 So. 3d at 565.

[9] *Howard v. TotalFina E & P USA, Inc.*, 899 So. 2d 882, 889 (Miss. 2005).

2.

The bankruptcy court identified several terms in conflict between the two arbitration agreements. They relate to (1) the number of arbitrators,[10] (2) selection of arbitrators,[11] (3) time allowed to respond,[12] (4) location of the arbitration,[13] (5) who pays the arbitration costs,[14] (6) who is entitled to attorneys' fees and on what

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[10] The first agreement requires a single arbitrator. The second provides for one arbitrator but permits either party to request a panel of three—provided that the requesting party agrees to pay the extra costs.

[11] Both agreements state that the parties should mutually select an arbitrator. The first agreement provides that if the parties cannot agree, then the Federal Arbitration Act's selection provisions will apply. But under the second agreement, if the parties can't agree, then the National Arbitration Forum will appoint the arbitrator.

[12] The first agreement gives a party thirty days to deliver an answering statement after receiving notice of the demand for arbitration. The second allows only twenty.

[13] The first agreement requires that the arbitration take place in Rankin County, Mississippi, unless the borrower requests that it be held in his county of residence or principal place of business. But the second agreement requires that the arbitration be held in the borrower's county of residence unless the parties agree otherwise.

[14] The first agreement requires the lender to "pay the arbitrator's fees and expenses for the first two days of [the] hearings," and it directs the arbitrator to require the parties to "pay his or her fees and other costs according to the relative fault of the parties." But the second agreement requires the "company" to "pay all costs of the arbitration, except that each party must" pay for its own attorneys, experts, and witnesses.

showing,[15] and (7) when arbitration doesn't apply.[16] The court held that those inconsistencies prevented a meeting of the minds, so Willis and Tower Loan hadn't agreed to arbitrate.

For that conclusion, the bankruptcy court relied mainly on *Ragab v. Howard*, 841 F.3d 1134 (10th Cir. 2016), which applied Colorado contract law. There (as here) the court analyzed multiple arbitration agreements that had conflicting procedural terms and held that the inconsistencies precluded a meeting of the minds. *See id.* at 1136–38. Justice (then-Judge) Neil Gorsuch dissented and would have concluded that the parties had agreed to arbitrate. *Id.* at 1139–41 (Gorsuch, J., dissenting). He urged that even if the parties "differ[ed] on the details concerning *how* arbitration should proceed," they united "on the fundamental question whether they wish[ed] to arbitrate or not." *Id.* at 1139, 1141. The rest was minor procedural detail. *See id.* at 1139.

3.

Willis asks us to follow *Ragab* and hold that the conflicting provisions thwarted a meeting of the minds. We decline his request. The parties' intentions were unmistakable: They wished to arbitrate any dispute

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[15] The first agreement doesn't say which party must pay fees for attorneys, experts, and witnesses. But the second agreement says that each party must bear its own costs in those regards unless the arbitrator decides otherwise.

[16] The first agreement states that the lender isn't required to arbitrate "for collection matters of $10,000 or less" or before the lender "repossess[es] collateral or foreclos[es] upon real property." The second agreement contains no such carve-out.

that might arise between them. Not once but twice they stated that any dispute arising from the loan Willis purchased should be arbitrated. Both agreements broadly cover "all claims and disputes between" Willis and Tower Loan, and both embrace any federal-law claim that Willis brings. The parties thus "evidently intended to enter into a binding contract." 1 WILLISTON § 4:21. We have more than enough to ascertain the terms. *See Leach*, 586 So. 2d at 802.

The conflicting provisions do not change that result. Though the agreements differ over procedural details, they speak with one voice about *whether to arbitrate.* We thus find good company in Justice Gorsuch: We will not shut our eyes to an agreement that demonstrates a baseline intent to arbitrate just because it contains inconsistent terms about procedural minutiae. *See Ragab*, 841 F.3d at 1139–41 (Gorsuch, J., dissenting).

Willis points out that contracts fail for indefiniteness where they don't set out matters such as the price in a first-refusal contract or rent owed under a lease.[17] So too here, he contends, we should find the contract indefinite because of the inconsistencies. But the conflicting terms here aren't like the essential terms of price and rent. Instead, they concern such innocuities as the number of arbitrators, location, and fee shifting. As Willis concedes, procedural terms about "time for performance and time for payment are non-

[17] *See Intrepid, Inc. v. Bennett*, 176 So. 3d 775, 778–79 (Miss. 2015) ("Without a definite agreement as to the amount of rental, there can be no binding lease contract."); *Duke v. Whatley*, 580 So. 2d 1267, 1273 (Miss. 1991) (refusing to enforce a first-refusal contract with a missing price).

essential."[18] The inconsistent terms here are similarly non-essential. Hence, under Mississippi law, the parties validly contracted to arbitrate.

IV.

Ordinarily the next step—after concluding that there is a valid agreement—is to determine whether *this* claim is arbitrable. *See Kubala*, 830 F.3d at 201. But because Tower Loan has pointed to a delegation clause, we ask only whether the parties "evince[d] an intent to have the arbitrator decide whether a given claim must be arbitrated." *Id.* at 202. They did. Each arbitration agreement has a delegation clause that mirrors the one we held valid in *Kubala*.[19] Hence, it is

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[18] *See, e.g.*, *Etheridge v. Ramzy*, 276 So. 2d 451, 454 (Miss. 1973) (recognizing that time for payment isn't an essential term); *Smith v. Mavar*, 21 So. 2d 810, 811 (Miss. 1945) (noting that time for performance isn't an essential term).

[19] The delegation clause in *Kubala*, 830 F.3d at 204, stated that

> [t]he arbitrator shall have the sole authority to rule on his/her own jurisdiction, including any challenges or objections with respect to the existence, applicability, scope, enforceability, construction, validity and interpretation of this Policy and any agreement to arbitrate a Covered Dispute.

The delegation clause in the first arbitration agreement states that

> [t]he Arbitrator shall have 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, or the to the [*sic*] arbitrability of any claim or counterclaim.

The delegation clause in the second arbitration agreement states that the agreement applies to disputes over "[w]hether the claim or dispute must be arbitrated" and "the validity of this arbitration agreement."

for the arbitrator—not us—to decide whether Willis's TILA claim is arbitrable. *See id.* It is similarly the arbitrator's province to resolve the inconsistent procedural terms.[20]

* * * *

For the foregoing reasons, the order denying Tower Loan's motion to dismiss or compel arbitration is REVERSED, and we REMAND to the district court and direct it to refer the dispute to arbitration.

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[20] *See, e.g.*, *BG Grp. PLC v. Republic of Arg.*, 572 U.S. 25, 34 (2014) (recognizing general presumption that "the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration"); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("Procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." (cleaned up)).

JAMES L. DENNIS, Circuit Judge, dissenting:

I respectfully dissent. In my view, the bankruptcy court properly applied state law and common law contract principles in deciding there was not a meeting of the minds or mutual assent on a contract to arbitrate. Hence, the bankruptcy court and district court judgments refusing to order arbitration should be affirmed. The majority of this panel reverses, however, following a dissent in the Tenth Circuit Court of Appeals that relied on a unique analogy to the "battle of forms" concept in UCC cases. *See Ragab v. Howard*, 841 F.3d 1134, 1140 (10th Cir. 2016) (Gorsuch, J., dissenting). The merit of that dissent's reasoning is debatable and does not appear to have been applied by any court to decide a meeting of the minds issue with respect to arbitration. If it is ever applied, its use should be limited to the kind of case and contract with respect to which it was conceived: a case that "involves parties to a commercial, not a consumer, transaction, with contracts actively negotiated by both sides, not contracts of adhesion thrust upon the plaintiff." *Id.* Indeed, it is precisely because *Ragab* involved transactions between knowledgeable merchants that the *Ragab* dissent deemed the battle of the forms—in which "conflicting terms [on merchants' standardized forms] . . . knock each other out but do not void [a] contract"—an apt analogy. *Id.* The present case, by contrast, involves ordinary consumer loan and insurance contracts that were presented to Willis, a mechanic and truck driver, without his having had the benefit of counsel or bilateral negotiation, but on a take it or leave it basis. Given this consumer transaction context, I agree with the bankruptcy court that an

analogy to the "mirror image" rule, where neither party is bound when the acceptance differs from the offer, is more appropriate. Accordingly, I believe the majority falls into serious error in adopting the *Ragab* dissent as a model for deciding the issue of mutual assent in consumer transactions in our circuit.

The Supreme Court has repeatedly reaffirmed that the Federal Arbitration Act (FAA) "declare[s] a national policy favoring arbitration of claims that parties contract to settle in that manner." *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (alteration in original) (internal quotation marks and citation omitted). In determining whether to enforce an arbitration agreement, our circuit follows "two analytical steps. The first is contract formation—whether the parties entered into *any arbitration agreement at all*. The second involves contract interpretation to determine whether *this* claim is covered by the arbitration agreement." *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016). The initial question, therefore, is whether as a matter of state contract law, the parties have entered into a valid arbitration agreement. *See id.* at 202. Importantly, the "federal policy favoring arbitration does not apply to th[is] determination." *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073–74 (5th Cir. 2002), *opinion supplemented on denial of reh'g*, 303 F.3d 570, 571 (5th Cir. 2002).

Under Mississippi law, a meeting of the minds is required to form a contract. *See Brooks v. Brooks*, 111 So. 376, 377 (Miss. 1927). As the majority notes, there is no Mississippi caselaw on whether conflicting terms

in arbitration agreements may prevent a meeting of the minds and thus thwart the formation of a contract to arbitrate. However, two courts in outside jurisdictions have addressed this subject and concluded that the parties in each case did not agree to arbitrate. *See Ragab*, 841 F.3d at 1138; *NAACP of Camden Cty. E. v. Foulke Mgmt. Corp.*, 24 A.3d 777, 794 (N.J. Super. Ct. App. Div. 2011). The majority makes scant mention of the principal holding in the first case, *Ragab v. Howard*, focusing almost solely (and misguidedly) on the dissent by then Judge (now Justice) Gorsuch and does not even cite the *NAACP of Camden Cty. E. v. Foulke Mgmt. Corp.* decision. An examination of the *Ragab* majority opinion and *NAACP*, however, shows that their reasoning is persuasive and ought be applied here.

In *NAACP*, a consumer who was buying a new vehicle signed various documents provided by the dealership in connection with her purchase. 24 A.3d at 780, 794-95. Several of the forms contained arbitration provisions, which conflicted with respect to the following material terms: (1) the venue of the arbitration, (2) which arbitration organization's rules would govern, (3) the time by which arbitration must be initiated, (4) how the costs of arbitration would be allocated, including whether a party was liable for attorneys, experts, and witness fees and on what showing, and (5) class-action waiver provisions. *Id.* at 794-95. After a dispute arose between the parties, the dealership moved to compel arbitration. *Id.* at 780. A New Jersey appeals court determined that there was no "meeting of the minds" on the issue of arbitration and thus no enforceable arbitration agreement because

"[v]iewed in their totality, the arbitration provisions . . . are too plagued with . . . inconsistencies to put a reasonable consumer on fair notice of their intended meaning." *Id.* at 794.

Similarly, in *Ragab,* the Tenth Circuit majority confronted multiple arbitration agreements that conflicted over "(1) which rules will govern, (2) how the arbitrator will be selected, (3) the notice required to arbitrate, and (4) who would be entitled to attorneys' fees and on what showing." *Ragab*, 841 F.3d at 1136. Applying Colorado law, the Tenth Circuit affirmed the district court's denial of a motion to compel arbitration. *Id.* Like the *NAACP* court, the Tenth Circuit concluded that the multiple inconsistencies thwarted a meeting of the minds—a requirement under state law to form a contract. *Id.* at 1137-38 (citing *Agritrack, Inc. v. DeJohn Housemoving, Inc.*, 25 P.3d 1187, 1192 (Colo. 2001)).

In the present case, the two arbitration agreements contain *seven* conflicting terms, which the majority inappropriately downplays as differences over mere "procedural minutiae." In the majority's view, these discrepancies do not defeat the conclusion that the parties agreed on the fundamental question of whether to arbitrate. Far from conflicting exclusively over a few "procedural details," however, the variances here are like those in *NAACP* and *Ragab*: numerous and material, concerning terms that go to the heart of arbitration. *See Ragab*, 841 F.3d at 1138; *NAACP*, 24 A.3d at 794; *see also Rotenberry v. Hooker*, 864 So.2d 266, 270 (Miss. 2003) (noting that under Mississippi

law, "[a] contract is unenforceable if the material terms are not sufficiently definite").

Take, for instance, the discrepancy over how long a party has to respond to a notice of demand for arbitration. While the first agreement provides for thirty days to deliver an answering statement after receiving notice, the second agreement permits only twenty days. A significant cost follows from filing an untimely answering statement: the opposing party is entitled to select the arbitrator. The length of time to respond to the notice is, thus, an important aspect of this agreement, and the ten-day difference in time to file a reply is a material distinction. Indeed, a difference over the length of notice required prior to proceeding to arbitration was one of the four conflicts in *Ragab* deemed significant enough to preclude formation of an agreement to arbitrate. *See Ragab*, 841 F.3d at 1136.

Like the arbitration agreements in *NAACP*, the agreements here also differ over the location of arbitration. *See* 24 A.3d at 794. While the first agreement requires that the arbitration be held in Rankin County, Mississippi, unless the borrower requests in the demand for arbitration or answering statement that it to be held in his county of residence, the second agreement states the arbitration will occur in the borrower's county of residence. The impact of this distinction is reduced somewhat because the first agreement empowers the borrower to move the arbitration to her county of residence, thus aligning the agreements. However, the borrower can only do so if (when the borrower is the party answering a demand)

she timely files an answering statement—and, as explained, the time by which a party must file such a statement is uncertain.

As with the arbitration provisions at issue in *Ragab*, the agreements here further conflict regarding how the arbitrator will be selected. *See Ragab*, 841 F.3d at 1136. The first agreement states that if the parties are unable to agree upon an arbitrator then the provisions of the Federal Arbitration Act (FAA) govern. *See* 9 U.S.C. § 5. Under the FAA, the court designates the arbitrator. *Id.* Conversely, the second arbitration agreement provides that in the event the parties do not agree upon the arbitrator then the National Arbitration Forum (NAF) will appoint the arbitrator.[1]

The most glaring—and material—difference between the agreements concerns who pays for the arbitration. This is analogous to both *NAACP* and *Ragab*; in those cases, inconsistencies between provisions on how the costs of arbitration would be allocated were key to the courts' determination that there was no meeting of the minds to arbitrate. *See Ragab*, 841 F.3d at 1136; *NAACP*, 24 A.3d at 795. Here, the first agreement requires the lender to "pay the arbitrator's fees and expenses for the first two days," yet later says that the "arbitrator shall direct the parties to pay his or her fees and other costs according to the relative fault of the parties." The

[1] The bankruptcy court noted that, following litigation, the NAF agreed to permanently stop administering arbitrations involving consumer debt. Thus, under the second agreement, it is unclear how an arbitrator will be selected if the parties cannot agree on whom to appoint.

bankruptcy court recognized this "internal[] inconsistency" in the first agreement. As if that weren't confusing enough, the second agreement requires Tower Loan to "pay all the costs of the arbitration, except that each party" pays for its own attorneys, experts, and witnesses. In view of these contradictions—both internal and otherwise—the bankruptcy court aptly opined that it couldn't "discern whether Tower Loan pays none, some, or all of the costs" of the arbitration.

As demonstrated, the extent of the conflicting terms here parallels the contradictory provisions in *Ragab* and *NAACP*. *See Ragab*, 841 F.3d at 1136; *NAACP*, 24 A.3d at 794-95. Indeed, the differences here are more numerous than in either of those cases. Without rehashing the details of the other remaining differences between the agreements—including over the number of arbitrators—it suffices to say that these conflicting terms are so copious and of such considerable import that there was no meeting of the minds. *See Brooks v. Brooks*, 111 So. 376, 377 (Miss. 1927).

While the sheer number of discrepancies militates in favor of a determination that there was no formation of a contract to arbitrate, this conclusion is further supported by the nature of the conflicts. I simply cannot agree with my colleagues' conclusion that these inconsistencies relate only to "non-essential" provisions. For instance, the matter of who pays for the arbitration is more akin to the essential term of price in a contract than it is to a mere "procedural detail" of the arbitration. *See Leach v. Tingle*, 586 So. 2d 799, 803 (Miss. 1991) (noting that price is an essential term of a

contract); *see also Ragab*, 841 F.3d at 1137 (finding that the three conflicting provisions prevented an agreement "upon all essential terms" (quoting *I.M.A., Inc. v. Rocky Mountain Airways, Inc.*, 713 P.2d 882, 888 (Colo. 1986))); *NAACP*, 24 A.3d at 798 (describing the conflicting terms as relating to "material parts of the arbitration"). It is also worth observing that this is not a case where one of the agreements contains a merger clause, which could potentially permit that agreement's arbitration clause to supersede the other one, thereby resolving the problem of the conflicting provisions. *Cf. Ex parte Palm Harbor Homes, Inc.,* 798 So.2d 656, 660-61 (Ala. 2001) (compelling arbitration pursuant to the terms contained in a contract with a merger clause because the merger clause caused that contract to supersede other agreements that had differing arbitration provisions).

The arbitration provisions here are "too plagued with . . . inconsistencies to put a reasonable consumer on fair notice of their intended meaning." *Ragab*, 841 F.3d at 1138 (quoting *NAACP*, 24 A.3d at 794). What's more, arbitrarily enforcing the terms of one agreement "[w]ould violate the other" agreement. *Id.* In sum, the cumulative effect of the conflicting terms compels the conclusion that there was no mutual assent to arbitrate, and thus Willis cannot be forced to arbitrate. *See GGNSC Batesville, LLC v. Johnson*, 109 So. 3d 562, 565 (Miss. 2013) (stating that "mutual assent" is an essential term of a contract).

For these reasons, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI NORTHERN DIVISION

CAUSE NO. 3:17-CV-1024-CWR-FKB

[Filed April 11, 2018]

TOWER LOAN OF MISSISSIPPI, LLC APPELLANT	)
V.	)
CHUCK WILLIS APPELLEE	)

ORDER

In this case, the Bankruptcy Court found that Chuck Willis and Tower Loan of Mississippi never formed a sufficiently definite agreement to arbitrate. Tower Loan now appeals. Review is *de novo*.

This is another case where it may cost more to litigate a narrow issue—here, whether the dispute should be heard by private arbitrators or public judges—than the total value of the underlying dispute. *E.g.*, *In re Martin*, 513 B.R. 303 (Bankr. S.D. Miss. 2014) (finding $1,869.95 loan to be dischargeable), *aff'd sub nom. Country Credit, LLC v. Martin*, No. 3:14-CV-709-CWR-LRA, 2015 WL 5656003 (S.D. Miss. Sept. 24,

2015), *aff'd sub nom. Matter of Martin*, 651 F. App'x 279 (5th Cir. 2016).[1] After all, once Tower Loan has paid for this appeal and another to the Fifth Circuit[2], it will still have to defend itself on the merits in one forum or another.

More surprising, perhaps, is Tower Loan's claim that so few terms in its arbitration agreement are material. In different circumstances, one suspects Tower Loan would argue fervently that contractual terms governing the number of arbitrators, the arbitrator selection process, the venue of arbitration, and the cost of arbitration, among others, were all material to its arbitration agreement. But here we are.

In any event, the undersigned has reviewed the arguments and authorities. It concludes that the Bankruptcy Court's thoughtful, meticulous, and well-reasoned opinion should be and hereby is affirmed in its entirety. A separate Final Judgment shall issue this day.

SO ORDERED, this the 11th day of April, 2018.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

[1] The underlying loan amount is not significant to Tower Loan, but the loan amount plus the fees for insurance and the associated extraordinary interest rate charged to the debtor is anything but inconsequential to the debtor, who is not a sophisticated party to the agreement.

[2] Before any ruling was issued, Tower Loan's attorneys had no doubt that they were continuing to the Fifth Circuit, having submitted to this Court briefs noting their compliance with Fifth Circuit Rules 25.2.13 and 32.2.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI NORTHERN DIVISION

CAUSE NO. 3:17-CV-1024-CWR-FKB

[Filed April 11, 2018]

TOWER LOAN OF MISSISSIPPI, LLC APPELLANT	)
V.	)
CHUCK WILLIS APPELLEE	)

FINAL JUDGMENT

Having entered an Order affirming the Bankruptcy Court, it is appropriate to issue this Final Judgment and close this case on the docket. Accordingly,

IT IS HEREBY ORDERED AND ADJUDGED that this case is dismissed with prejudice.

SO ORDERED, this the 11th day of April, 2018.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

CASE NO. 17-00160-NPO
CHAPTER 7

ADV. PROC. NO. 17-00025-NPO

[Filed December 12, 2017]

IN RE: CHUCK WILLIS,	)
	)
DEBTOR.	)
	)
CHUCK WILLIS	)
	)
PLAINTIFF	)
	)
VS.	)
	)
TOWER LOAN OF MISSISSIPPI, LLC, d/b/a TOWER LOAN OF CRYSTAL SPRINGS	)
	)
DEFENDANT	)
	)

[SEAL] **SO ORDERED,**

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: December 12, 2017

The Order of the Court is set forth below. The docket reflects the date entered.

MEMORANDUM OPINION AND ORDER ON DEFENDANT TOWER LOAN'S MOTION TO DISMISS OR, ALTERNATIVELY, TO COMPEL ARBITRATION AND TO DISMISS OR STAY CLAIMS PENDING ARBITRATION

This matter came before the Court for hearing on October 25, 2017 (the "Hearing"), on the Defendant Tower Loan's Motion to Dismiss or, Alternatively, to Compel Arbitration and to Dismiss or Stay Claims Pending Arbitration (the "Motion to Dismiss or to Compel Arbitration") (Adv. Dkt. 8)[1] filed by Tower Loan of Mississippi, LLC ("Tower Loan"), the Defendant Tower Loan's Memorandum in Support of Motion to Dismiss or, Alternatively, to Compel Arbitration and to Dismiss or to Stay Pending Arbitration ("Tower Loan's Brief") (Adv. Dkt. 9) filed by Tower Loan, the Plaintiff's Response to Defendant's Motion to Dismiss and to Compel Arbitration (the "Debtor's Response") (Adv. Dkt. 17) filed by the debtor, Chuck Willis (the "Debtor"), the Memorandum Brief in Support of Plaintiff's Response to Defendant's Motion to Dismiss and to Compel Arbitration (the "Debtor's Brief") (Adv. Dkt. 18) filed by the Debtor, and the Defendant Tower Loan's Reply in Support of its Motion to Compel Arbitration and to Dismiss or to Stay Pending

[1] Citations to the record are as follows: (1) citations to docket entries in the above-styled adversary proceeding (the "Adversary") are cited as "(Adv. Dkt. __)"; and (2) citations to docket entries in the above-styled bankruptcy case (the "Bankruptcy Case") are cited as "(Bankr. Dkt. __)".

Arbitration ("Tower Loan's Reply") (Adv. Dkt. 21) filed by Tower Loan in the Adversary. At the Hearing, Bryce Kunz represented the Debtor, and Jeffrey Ryan Barber represented Tower Loan. During the Hearing, the Debtor and Tower Loan (collectively, the "Parties") introduced into evidence two (2) stipulated exhibits. The issues in the Adversary are: (1) whether the Parties formed an agreement to arbitrate and (2) whether the arbitration agreement actually contains a delegation clause requiring the Parties' claims to proceed to arbitration. The Court, having considered the pleadings, evidence, and arguments of counsel, finds that the Parties did not agree to arbitrate for the reasons set forth below.[2]

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of this Adversary pursuant to 28 U.S.C. § 1334. Notice of the Motion to Dismiss or to Compel Arbitration was proper under the circumstances.

Facts

1. On November 8, 2016, the Debtor entered into the Installment Loan Agreement and Disclosure Statement (the "Loan Agreement") with Tower Loan (Ex. 1). The Debtor financed $4,481.98 with a 37.36% annual rate of interest to be paid in twenty-six (26) equal installments of $254.00 for a total payment to

[2] Pursuant to Rule 52 of the Federal Rules of Civil Procedure, as made applicable to the Adversary by Rule 7052 of the Federal Rules of Bankruptcy Procedure, the following constitutes the findings of fact and conclusions of law of the Court.

Tower Loan of $6,604.00. (*Id.*) Additionally, the Debtor obtained from Tower Loan credit life insurance at $228.94 per annum, credit disability insurance at $303.78 per annum, and credit property insurance at $429.26 per annum. (*Id.*)

2. The Loan Agreement consists of one (1) page and does not contain a merger clause.[3] The Debtor's signature appears at the bottom of the document, and the following language, in all capital letters, appears directly above the Debtor's signature: "Arbitration Agreement: By signing below and obtaining this [l]oan, [b]orrower agrees to the Arbitration Agreement on the additional pages of this [a]greement. You should read it carefully before you sign below. Important provisions, including our privacy policy, are contained on additional pages and incorporated herein." (the "Arbitration Disclaimer") (Ex. 1).

3. The reverse side of the Loan Agreement contains the Arbitration Agreement (the "First Arbitration Agreement") (Ex. 1). The First Arbitration Agreement "applies to all claims and disputes between [b]orrower and [l]ender," including "[t]he loan [b]orrower is obtaining from [l]ender today and any other loans or

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[3] A merger clause "signal[s] to the courts that the parties agree that the contract is to be considered completely integrated." *Grand Legacy, LLP v. Gant*, 66 So. 3d 137, 145 (Miss. 2011). A standard merger clause "achieves the purpose of ensuring that the contract at issue invalidates or supersedes any previous agreements, as well as negat[es] the apparent authority of an agent to later modify the contract's terms." *LHC Nashua P'ship, Ltd. v. PDNED Sagamore Nashua, L.L.C.*, 659 F.3d 450, 460 (5th Cir. 2011) (quoting *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W. 3d 323, 334 (Tex. 2011)).

retail installment contracts with [l]ender" and "[a]ny insurance purchased in connection with this loan or any previous loan or retail installment sales contract." (Ex. 1).

4. The Loan Agreement provides that "[t]he construction, validity, and enforcement of this loan agreement shall be governed by the laws of the State of Mississippi, without regard to the principles of conflicts of laws." (Ex. 1).

5. In Tower Loan's Brief, Tower Loan asserts that the First Arbitration Agreement contains a delegation clause.

6. On January 17, 2017, the Debtor filed a petition for relief under chapter 7 of the U.S. Bankruptcy Code (Bankr. Dkt. 1).

7. On May 12, 2017, the Debtor filed the Complaint in this Adversary alleging that Tower Loan violated the Truth in Lending Act, 15 U.S.C. § 1600 *et seq*., and Regulation 2 by providing misleading and incorrect disclosures on the Loan Agreement (Adv. Dkt. 1 at 4-5). For example, the Debtor alleges that Tower Loan did not pay to the appropriate insurance company the amounts required for the Debtor's life insurance, disability insurance, and property insurance (Adv. Dkt. 1 at 3, ¶ 15). The Debtor further asserts that Tower Loan "received an undisclosed commission from these charges." (*Id*.)

8. On June 22, 2017, Tower Loan filed the Answer and Affirmative Defenses to Complaint [Adv. Proc. Dkt. #3] [*sic*] (Adv. Dkt. 6). Tower Loan filed the Amended Answer and Affirmative Defenses to

Complaint [Adv. Proc. Dkt. #3] [*sic*] (the "Amended Answer") on October 30, 2017, denying that it violated the Truth in Lending Act (Adv. Dkt. 22).[4]

9. On July 6, 2017, Tower Loan filed the Motion to Dismiss or to Compel Arbitration. In support of dismissal, Tower Loan asserted that the chapter 7 trustee (the "Trustee") is the only party with standing to pursue the Debtor's claims against Tower Loan because those claims became property of the estate upon commencement of the Bankruptcy Case (Adv. Dkt. 9). In support of compelling arbitration, Tower Loan asserted that the Debtor signed the Loan Agreement containing the Arbitration Disclaimer. (*Id.*)

10. On September 26, 2017, the Trustee filed the Notice of Ratification of Real Party in Interest (Adv. Dkt. 16).

11. On September 26, 2017, the Debtor filed the Debtor's Response. In support of denying dismissal, the Debtor asserted that the Trustee, as the real party in

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[4] The first paragraph of the Amended Answer states: "Further, in accordance with Federal Rules of Bankruptcy Procedure 7012(b) and 9015(a), Miss. Bank. L.R. 7012-1 and 9015-1, and Federal Rule of Civil Procedure 38, *Country Credit, LLC* demands a jury trial on all of the claim [*sic*] raised in the Adversary Proceeding Complaint, and *Country Credit, LLC* does not consent to having a jury trial conducted by a Bankruptcy Judge under 28 U.S.C. § 157(e) or to the entry of final orders or judgment by the Bankruptcy Court." (Adv. Dkt. 22 at 1) (emphasis added). In light of the pleadings and arguments made by counsel at the Hearing, the Court notes that this language in the Amended Answer is clearly the result of a typographical error on behalf of Tower Loan. Country Credit, LLC is not a party to the Adversary, and Tower Loan has requested the Court to compel arbitration in lieu of litigation.

interest, ratified the Adversary. In support of litigation, the Debtor asserted that it was unclear whether he actually agreed to the arbitration agreement and that procedural unconscionability precluded enforcing the First Arbitration Agreement. The Debtor attached the Affidavit of Chuck Wills to the Debtor's Response.

12. On October 10, 2017, Tower Loan filed Tower Loan's Reply withdrawing its contention that the Debtor lacked standing. Tower Loan further asserted that the Parties formed a valid agreement to arbitrate and that the First Arbitration Agreement is not unconscionable. Additionally, Tower Loan argued that unconscionability is an issue for the arbitrator to decide since the First Arbitration Agreement contains a delegation clause.

13. At the Hearing, the Parties presented to the Court, for the first time, the Endorsement to Require Binding Arbitration (the "Second Arbitration Agreement") (together with the First Arbitration Agreement, the "Arbitration Agreements") (Ex. 2). The Second Arbitration Agreement "applies to all claims and disputes between [b]orrower and the [c]ompany," including "the loan [b]orrower is obtaining from the lender today, any other loans or retail installment contracts with the [l]ender," and "any insurance purchased from the [c]ompany in connection with the loan or any previous loan or retail installment sales contract." (Ex. 2). Tower Loan explained that the Second Arbitration Agreement makes up the

"additional pages" referenced in the Loan Agreement's Arbitration Disclaimer.[5]

14. The Arbitration Agreements contain conflicting arbitration provisions. The conflicts involve: (1) the number of arbitrators,[6] (2) how the arbitrator(s) will be selected,[7] (3) the notice required to arbitrate,[8] (4) the location of the arbitration,[9] (5) who pays the costs of the

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[5] 10:10:32 – 10:10:52. The Hearing was not transcribed. References to argument presented at the Hearing is cited by the timestamp of the audio recording.

[6] The First Arbitration Agreement provides that "[t]he dispute shall be heard by a single arbitrator," but the Second Arbitration Agreement permits a party to request a panel of three arbitrators.

[7] The First Arbitration Agreement provides that "[i]f an answering statement is filed and the parties cannot agree upon the arbitrator, then the provisions of the Federal Arbitration Act (9 U.S.C. §5), shall apply," but the Second Arbitration Agreement provides that "[i]f an answering statement is filed and the parties cannot agree upon the arbitrator, the National Arbitration Forum shall appoint the arbitrator."

[8] The First Arbitration Agreement requires a thirty (30)-day notice period before proceeding to arbitration, whereas the Second Arbitration Agreement requires only twenty (20) days. Additionally, under the Arbitration Agreements, if a party files an answering statement after the expiration of the notice period, the opposing party selects the arbitrator.

[9] The First Arbitration Agreement provides that "[t]he arbitration shall be held in Rankin County, Mississippi, unless the [b]orrower requests in the demand for arbitration or the answering statement, the arbitration to be held in his, her, or its county of residence or principal place of business," but the Second Arbitration Agreement provides automatically for the arbitration to be held in the borrower's county of residence.

arbitration,[10] (6) who would be entitled to attorneys' fees and on what showing,[11] and (7) when arbitration proceedings need not be initiated.[12] (Ex. 1; Ex. 2).

15. At the Hearing, the Debtor argued that because the Arbitration Agreements govern "all claims and disputes between the Parties" but contain different and conflicting terms, there was no meeting of the minds between the Parties with respect to arbitration.[13] In response, Tower Loan asserted that the Parties reached a meeting of the minds with respect to

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[10] The First Arbitration Agreement provides that the "[l]ender shall pay the arbitrator's fees and expenses for the first two days of hearings." Further, the First Arbitration Agreement provides that "[i]n his decision or award, the arbitrator shall direct the parties to pay his or her fees and other costs according to the relative fault of the parties." Additionally, the Second Arbitration Agreement provides that "the [c]ompany shall pay all costs of the arbitration," excluding attorneys, experts, and witness fees and expenses.

[11] The First Arbitration Agreement does not address which party is responsible for paying attorneys, experts, and witness fees and expenses. The Second Arbitration Agreement, however, provides that "each party must bear the cost of its own attorneys, experts and witness fees and expenses," unless the arbitrator chooses to award otherwise.

[12] Under the First Arbitration Agreement, the "[l]ender is not required to initiate arbitration proceedings for collection matters of $10,000 or less or before repossessing collateral or foreclosing upon real property. However, disputes arising out of or relating to foreclosure or repossession of collateral shall be arbitrated." The Second Arbitration Agreement, however, contains no such carve out.

[13] 10:22:40 – 10:22:57.

arbitration.[14] More specifically, Tower Loan argued that the First Arbitration Agreement governs the Loan Agreement, and the Second Arbitration Agreement relates only to disputes concerning insurance companies and policies.[15] With respect to the Adversary, Tower Loan asserted that it would proceed only under the First Arbitration Agreement because the Complaint does not raise any insurance-related claims.[16]

Discussion

The Supreme Court of the United States has long acknowledged "a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston v. Ferrer*, 552 U.S. 346, 349 (2008). Indeed, the Federal Arbitration Act (FAA) provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2. With this policy in mind, however, "courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *see Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Volt Info. Scis., Inc. v. Bd. of Trs. of the*

[14] 10:30:45 – 10:30:54.

[15] 10:30:58 – 10:31:17.

[16] 10:31:18 – 10:31:29.

Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

Thus, the enforcement of an arbitration agreement is a matter of both contract formation and contract interpretation. *Kubala v. Supreme Prod. Srvs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016). The Fifth Circuit Court of Appeals has established a two-prong test for courts to follow when ruling on a motion to compel arbitration: (1) "whether the parties entered into *any arbitration agreement at all*" and (2) "whether *this* claim is covered by the arbitration agreement." *Id.* When an "arbitration agreement contains a delegation clause giving the arbitrator the primary power to rule on the arbitrability of a specific claim . . . the court's power to decide arbitrability questions [transfers] to the arbitrator." *Id.* at 201-02. In other words, "a valid delegation clause requires the court to refer a claim to arbitration to allow the arbitrator to decide gateway arbitrability issues." *Id.* at 202; *see Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). When a "party seeking arbitration points to a purported delegation clause," the court limits its analysis to that of contract formation and answers only the question of whether the parties entered into an agreement to arbitrate some set of claims. *Kubala*, 830 F.3d at 202. If the court finds both a valid agreement to arbitrate and a delegation clause within that agreement, "the motion to compel arbitration should be granted in almost all cases." *Id.*

Here, Tower Loan contends that the First Arbitration Agreement contains a valid and enforceable delegation clause (Adv. Dkt. 9). As a result, the Court

will address two issues: first, whether the Parties entered into a valid agreement to arbitrate a set of claims; and second, whether that agreement contains a delegation clause requiring the Parties' claims to proceed to arbitration "for gateway rulings on threshold arbitrability issues." *Id.*

A. Did the Parties enter into a valid agreement to arbitrate a set of claims?

The "federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties." *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073-74 (5th Cir. 2002); *see also Volt Info. Scis., Inc.*, 489 U.S. at 478 ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so."). Instead, state contract law determines whether parties entered into a valid agreement to arbitrate a set of claims. *Kubala*, 830 F.3d at 202. Since the Loan Agreement provides that Mississippi law governs "[t]he construction, validity and enforcement of th[e] loan agreement" and the Parties directed the Court to Mississippi law in their pleadings and at the Hearing, the Court will apply Mississippi law to determine whether the Parties entered into a valid agreement to arbitrate their claims.

Under Mississippi law, "[a] contract is unenforceable if the material terms are not sufficiently definite." *Rotenberry v. Hooker*, 864 So. 2d 266, 270 (Miss. 2003). A contract is sufficiently definite when it contains enough information to "enable the court under proper rules of construction to ascertain its terms." *Hunt v. Coker*, 741 So. 2d 1011, 1014 (Miss. 1999)

(quoting *Leach v. Tingle*, 586 So. 2d 799, 802 (Miss. 1991)). Additionally, a meeting of the minds is essential for an agreement to be valid and binding upon the parties. *Davis v. Davis (Estate of Davis)*, 832 So. 2d 534, 537 (Miss. App. Ct. 2001); *see Union Planters Bank, Nat'l. Ass'n v. Rogers*, 912 So. 2d 116, 120 (Miss. 2005) ("A cardinal rule of construction of a contract is to ascertain the mutual intentions of the parties."). While no Mississippi court[17] has addressed whether parties can be compelled to arbitrate under conflicting arbitration agreements, other courts have found that conflicting arbitration agreements eliminate the duty to arbitrate.[18]

1. The Tenth Circuit Court of Appeals' Decision

In *Ragab v. Howard*, 841 F.3d 1134 (10th Cir. 2016), the Tenth Circuit Court of Appeals held that "conflicting details in the multiple arbitration provisions indicate that there was no meeting of the

[17] In the Motion to Dismiss or to Compel Arbitration, Tower Loan references this Court's Memorandum Opinion and Order Granting Motion of the Bilco Company for Relief from the Automatic Stay to Complete Arbitration, *In re Katon, Inc.*, No. 08-02266-NPO (Dkt. 73) (Bankr. S.D. Miss. Nov. 13, 2008). *In re Katon, Inc.* is not factually analogous to the Adversary because it does not involve conflicting arbitration agreements, but rather a single arbitration agreement executed by the parties after the execution of the underlying agreements in which the parties agreed to arbitrate the non-core proceeding filed in state court. Accordingly, the Court does not find *In re Katon, Inc.* persuasive in the Adversary.

[18] See, e.g., In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig., 838 F. Supp. 2d 967, 992 (C.D. Cal. 2012); Basulto v. Hialeah Auto., 141 So. 3d 1145, 1156 (Fla. 2014).

minds with respect to arbitration." *Id.* at 1138. In *Ragab*, the parties entered into a business relationship evidenced by six agreements containing conflicting arbitration provisions. *Id.* at 1136. The conflicts involved the following: "(1) which rules will govern,[19] (2) how the arbitrator will be selected,[20] (3) the notice required to arbitrate,[21] and (4) who would be entitled to attorneys' fees and on what showing."[22] *Id.* A few years later, plaintiff sued the defendants for misrepresentation and violation of consumer credit repair statutes. The district court found that all six agreements governed plaintiff's claims. The defendants moved to compel arbitration, and the district court denied the motion, "concluding that there was no actual agreement to arbitrate as there was no meeting of the minds as to how claims that implicated the numerous agreements would be arbitrated." *Id.* The defendants appealed.

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[19] One agreement provided that Colorado's Uniform Arbitration Act of 1975 would govern, three agreements provided that the AAA Commercial Arbitration Rules would govern, and one agreement provided that the "Rules of the Colorado Court" would govern the arbitration. *Ragab*, 841 F.3d at 1136 n.1.

[20] One agreement provided that the parties would choose the arbitrator. If the parties could not agree upon an arbitrator, a state court would appoint one. Three agreements provided that the American Arbitration Association (AAA) would choose the arbitrator. *Id.*

[21] One agreement required a thirty (30)-day notice period, and two agreements required only a ten (10)-day notice period before beginning arbitration. *Id.*

[22] One agreement required each party to pay its own costs and fees, but three agreements allowed for the arbitrator to award costs and fees to the prevailing party. *Id.*

Upon review, the Tenth Circuit applied Colorado law to determine whether the parties agreed to arbitrate. *Id.* at 1137. The applicable state law required the parties to achieve a meeting of the minds with respect to the agreement and agree on all essential terms. *Id.* The Tenth Circuit looked to the New Jersey court's decision in *NAACP of Camden County East v. Foulke Management Corporation*, 24 A.3d 777 (N.J. Super. Ct. App. Div. 2011), for guidance on whether the parties achieved a meeting of the minds on the decision to arbitrate their claims.[23]

In *NAACP*, the parties presented the court with three agreements that each contained an arbitration provision. *NAACP of Camden Cty. E.*, 24 A.3d at 781-82. Similar to the arbitration agreements in *Ragab*, these arbitration provisions contained several inconsistencies. *Id.* at 794. For example, "the documents d[id] not clearly and consistently express the nature and locale of the arbitration forum itself." *Id.* The first agreement provided that the venue of the arbitration would lie in the federal district in which the purchaser resided, the second agreement more narrowly provided that venue would lie in the customer's county of residence, and the third agreement more broadly provided that venue would lie in New Jersey, unless otherwise agreed upon by the parties. *Id.* Further, "[t]he form documents . . . d[id] not make clear the time limit in which arbitration must be initiated." *Id.* The first agreement did not contain a time limitation, the second agreement indicated that all applicable statutes of limitation applied, and the

[23] The Tenth Circuit considered *NAACP* because there were no factually analogous cases in Colorado.

third agreement required the purchaser to bring all claims within 180 days from the date of the agreement, while also providing that it would not affect applicable statutes of limitation. *Id.* at 794-95. "Equally murky," the agreements contained various provisions describing the arbitration costs. *Id.* at 795-96. The cost provisions in one agreement were "in some respects potentially less favorable to the purchaser, . . . in some respects potentially more favorable, and in some respects unclear." *Id.* at 795.

Based on these conflicts, the New Jersey court found that "the arbitration provisions . . . [were] too plagued with confusing terms and inconsistencies to put a reasonable consumer on fair notice of their intended meaning." *Id.* at 794. Thus, the New Jersey court held that the conflicting arbitration provisions were "unenforceable for lack of mutual assent." *Id.* at 798. Because of *NAACP*'s factual similarities to *Ragab* and the Supreme Court of the United States' finding in *AT&T Mobility LLC* that "the FAA does not require an arbitration provision to be enforced if the provision is defective for reasons other than public policy or unconscionability," the Tenth Circuit adopted the reasoning of the court in *NAACP* and affirmed the district court's decision, holding that the parties did not achieve a meeting of the minds with respect to

arbitration.[24] *Ragab*, 841 F.3d at 1138; *see AT&T Mobility LLC*, 563 U.S. at 344.

Associate Justice Neil Gorsuch, former Circuit Judge for the Tenth Circuit Court of Appeals, dissented in *Ragab*, arguing that the parties formed a valid agreement to arbitrate their claims. *Ragab*, 841 F.3d at 1139 (Gorsuch, J., dissenting). As a preliminary matter, Justice Gorsuch noted that *Ragab* involved sophisticated parties to a commercial deal. In fact, plaintiff's counsel drafted three of the agreements containing arbitration clauses. *Id*. While acknowledging that the agreements differed on "the details concerning *how* arbitration should proceed," Justice Gorsuch argued that "treating the procedural details surrounding the arbitration . . . as *non*essential terms would do a good deal more to 'effectuate[] the intent of the parties' . . . itself always the goal of contract interpretation." *Id.* (citing *Lane v. Urgitus*, 145 P.3d 672, 677 (Colo. 2006)). To do this, Justice Gorsuch proposed two courses of action. First, the plaintiff could initiate arbitration under the agreement of his choosing because "the defendants have expressly acknowledged that his claims f[ell] within the scope of every single agreement." *Ragab*, 841 F.3d at 1139 (Gorsuch, J. dissenting). Second, the state's preference for

[24] The Tenth Circuit noted that "[c]ourts have granted motions to compel despite the existence of conflicting arbitration provisions when the contracts themselves provide the solution." *Ragab*, 841 F.3d at 1138; *see Ex parte Palm Harbor Homes, Inc.*, 798 So. 2d 656, 660 (Ala. 2001) (compelling arbitration when a contract includes an arbitration provision and a merger clause because the merger clause enables the arbitration provision to supersede other, conflicting provisions). None of the agreements in *Ragab*, however, contained merger clauses. *Ragab*, 841 F.3d at 1138.

arbitration has caused it to enforce arbitration clauses stating only that claims "shall be submitted to binding arbitration" with no mention of procedural details. *Id.* The procedural details can later be established by the FAA or state statutory law. *Id.* at 1139-40.

Next, Justice Gorsuch explained a "battle of the forms" analogy where "purchasers and vendors agree to transact but each side memorializes the deal on its own standard forms." *Id.* at 1140. When these forms contain conflicting terms, they "knock each other out but do not void the contract." *Id.* Under the Uniform Commercial Code, "a meeting of the minds occurs with respect to the fundamentals of the deal even if not with respect to the details." *Id.* Since the case involved sophisticated parties who mutually contributed to drafting the agreements, Justice Gorsuch argued that a "battle of the forms" approach would better serve the parties' intent to arbitrate their claims rather than "allowing the plaintiff to escape the consequences of a choice he once so clearly preferred but now simply regrets." *Id.*

To protect consumers, New Jersey courts stress a "need for clarity" in arbitration agreements and take "particular care" in assessing mutual asset because of a consumer's inferior bargaining power. *Id.*; *see NAACP of Camden Cty. E.*, 24 A.3d at 790-91, 97. Justice Gorsuch, however, did not find *NAACP* persuasive because *Ragab* "involve[d] parties to a commercial, not a consumer, transaction, with contracts actively negotiated by both sides, not contracts of adhesion thrust upon the plaintiff." *Ragab*, 841 F.3d at 1140. When a state has not adopted a public policy statute requiring clarity in a consumer contract, Justice

Gorsuch argues that the court should further the national policy favoring arbitration and not create barriers to arbitration, particularly in a commercial setting where the parties are represented by counsel and "have so clearly and repeatedly demonstrated their desire to arbitrate." *Id.* Justice Gorsuch did not provide any citations to cases where courts compelled arbitration when an agreement contained materially inconsistent and conflicting arbitration provisions. With *NAACP*, *Ragab*, and Justice Gorsuch's dissent in *Ragab* in mind, the Court now turns to the Adversary to determine precisely the same issue—whether the Parties formed a valid agreement to arbitrate their claims.

2. The Adversary

In its opening remarks at the Hearing, Tower Loan argued that the First Arbitration Agreement contains a delegation clause and, therefore, the Court's analysis is limited to whether the Parties entered into a valid agreement to arbitrate their claims and whether the agreement actually contains a delegation clause requiring the claims to proceed to arbitration for gateway rulings.[25] Tower Loan argued that the Parties undisputedly agreed to arbitrate their claims because the Debtor signed both the Loan Agreement containing the First Arbitration Agreement and the Second Arbitration Agreement.[26] Additionally, Tower Loan explained that Mississippi law requires a borrower to read documents before applying his signature, and the

[25] 10:13:36 – 10:15:15; *see Kubala*, 830 F.3d at 202.

[26] 10:08:40 – 10:09:00.

Debtor cannot avoid arbitration simply because he did not know the terms of the Loan Agreement.[27] In response, the Debtor contended that while he did sign both the Loan Agreement containing the First Arbitration Agreement and the Second Arbitration Agreement, the Arbitration Agreements contain inconsistent and conflicting terms.[28] Because of the inconsistent and conflicting terms, the Debtor argued that the Parties did not achieve a meeting of the minds on the decision to arbitrate their claims.[29] Tower Loan, however, claimed that the Parties reached a meeting of the minds with respect to arbitration.[30] In support its argument, Tower Loan contended that the Arbitration Agreements govern different issues and/or parties, and the Second Arbitration Agreement relates only to claims against insurance companies arising out of insurance policies.[31] To the extent that the Arbitration

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[27] 10:13:10 – 10:13:24.

[28] 10:22:40 – 10:22:57.

[29] 10:22:58 – 10:28:02.

[30] 10:30:45 – 10:30:54.

[31] 10:30:58 – 10:31:17. In support of its argument that the Second Arbitration Agreement applies only to claims against insurance companies arising out of insurance policies, Tower Loan highlighted the following provisions: (1) the title of the agreement is "Endorsement to Require Binding Arbitration;" (2) the Second Arbitration Agreement defines "Company" as "the insurance company or companies as marked below;" (3) the last paragraph of the Second Arbitration Agreement provides that "[t]his endorsement applies to the policy or policies issued by the [c]ompany or [c]ompanies marked below;" and (4) American Federated Life Insurance Company and American Federated Insurance Company are the only companies listed, and both are marked with an "X." (Ex. 2).

Agreements conflict, Tower Loan argued that the inconsistencies are irrelevant because, in the Adversary, Tower Loan is proceeding only under the First Arbitration Agreement.[32] Because Tower Loan asserted that the Arbitration Agreements govern separate issues and/or parties, and the Debtor maintained that the Arbitration Agreements encompass all parties and claims but contain inconsistent and conflicting procedural provisions, the Court will first address whether the Arbitration Agreements govern separate issues and/or parties to determine if the inconsistent and conflicting provisions should impact the Court's analysis on whether the Parties achieved a meeting of the minds with respect to arbitration.

After reviewing the Loan Agreement and the Arbitration Agreements, the Court finds that the Arbitration Agreements govern claims against Tower Loan both arising under the Loan Agreement and out of insurance policies. For example, the First Arbitration Agreement "applies to *all* claims and disputes between [b]orrower and [l]ender . . . includ[ing] . . . *all* claims and disputes arising out of . . . [t]he loan [b]orrower is obtaining from [l]ender today and . . . [a]ny insurance purchased in connection with this loan." (Ex. 1, ¶ 1) (emphasis added). Additionally, the First Arbitration Agreement "applies to *all* disputes and claims between [b]orrower and [l]ender, [l]ender's agents, employees, affiliated corporations and the employees or agents of these affiliated companies." (*Id.* ¶ 2) (emphasis added). The lender is defined as *Tower*

[32] 10:31:18 – 10:31:29.

Loan of Mississippi, LLC, and the affiliated companies include, without limitation, "*American Federated Insurance Company*, *American Federated Life Insurance Company*, First Tower Loan LLC, Tower Loan of Mississippi LLC, Gulfco of Mississippi LLC, Gulfco of Alabama LLC, Gulfco of Louisiana LLC, Tower Loan of Missouri LLC, and First Tower LLC." (*Id.*) (emphasis added). Further, the Second Arbitration Agreement "applies to *all* claims and disputes between [b]orrower and the [c]ompany . . . includ[ing] . . . *all* claims and disputes arising out of . . . the loan [b]orrower is obtaining from the lender today [and] . . . any insurance purchased from the [c]ompany in connection with the loan." (Ex. 2, ¶ 1) (emphasis added). The Second Arbitration Agreement also "applies to *all* disputes and claims between [b]orrower and the [c]ompany, the [c]ompany's agents, employees, affiliated corporations and the employees or agents of these affiliated companies." (*Id.* ¶ 2) (emphasis added). The company is defined as both *American Federated Life Insurance Company* and *American Federated Insurance Company*, and the affiliated companies include, without limitation, "First Tower Loan, LLC, FT Finance Holding LLC, *Tower Loan of Mississippi, LLC*, and Gulfco of Mississippi, LLC." (*Id.*) (emphasis added). After drafting the Arbitration Agreements as broadly as possible, Tower Loan cannot now "arbitrarily pick one to enforce [in the Adversary] because doing so could violate the other." *Ragab*, 841 F.3d at 1138. The Court finds that the Arbitration Agreements' inconsistent and conflicting provisions, therefore, are relevant to its determination of whether

the Parties achieved a meeting of the minds with respect to arbitration.[33]

Similar to the courts in *Ragab* and *NAACP*, the Court finds that the Arbitration Agreements contain several material conflicts and inconsistencies. The conflicts and inconsistencies concern the following: (1) the number of arbitrators, (2) how the arbitrator(s) will be selected, (3) the notice required to arbitrate, (4) the location of the arbitration, (5) who pays the costs of the arbitration, (6) who would be entitled to attorneys' fees and on what showing, and (7) when arbitration proceedings need not be initiated. The Court will address each in turn.

First, the First Arbitration Agreement provides that "[t]he dispute shall be heard by a single arbitrator." (Ex. 1, ¶ 4). The Second Arbitration Agreement, however, permits a party to request "a panel of three arbitrators instead of a single arbitrator." (Ex. 2, ¶ 4). Thus, the Arbitration Agreements are inconsistent.

Second, and similar to *Ragab*, the First Arbitration Agreement provides that "[i]f an answering statement is filed and the parties cannot agree upon the arbitrator, then the provisions of the Federal Arbitration Act (9 U.S.C. §5), shall apply." (Ex. 1, ¶ 4). Under this provision, "the court shall designate and

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[33] Since the Loan Agreement does not contain a merger clause, the Court is unable to discern whether one arbitration agreement could potentially supersede the other arbitration agreement. *See Ex parte Palm Harbor Homes, Inc.*, 798 So. 2d at 660 (compelling arbitration when a contract includes an arbitration provision and a merger clause because the merger clause enables the arbitration provision to supersede other, conflicting provisions).

appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein." 9 U.S.C. § 5. In the Second Arbitration Agreement, however, "[i]f an answering statement is filed and the parties cannot agree upon [the] arbitrator, the National Arbitration Forum[34] shall appoint the arbitrator." (Ex. 2, ¶ 4). The Arbitration Agreements, therefore, conflict with each other.[35]

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[34] On July 14, 2009, the Minnesota Attorney General filed a lawsuit against the National Arbitration Forum "(NAF)" for alleged violation of various state consumer protection laws, deceptive trade practices, and false advertising. *See* Complaint, *State of Minnesota v. National Arbitration Forum, Inc., et. al.*, No. 27-CV-09-18550 (Dkt. 1) (D. Minn. July 14, 2009). The Complaint alleged that the NAF, in an attempt to earn revenue, "work[ed] alongside creditors behind the scenes—against the interests of consumers—to convince creditors to place mandatory pre-dispute arbitration clauses in their customer agreements and to appoint the [NAF] as the arbitrator of any disputes that may arise in the future." *Id.* The Complaint further alleged that the NAF "hid[] from the public . . . that [it] is financially affiliated with a New York hedge fund group that owns one of the country's major debt collection enterprises." *Id.* Shortly after the filing of the Complaint, the NAF agreed to "permanently stop administering arbitrations involving consumer debt." Press Release, State of Minnesota Office of the Attorney General, National Arbitration Forum Barred from Credit Card and Consumer Arbitrations under Agreement with Attorney General Swanson (July 19, 2009), http://static.cbslocal.com/station/wcco/news/local/09_0719_agsuesnationalarbitrationforum.pdf. Accordingly, under the Second Arbitration Agreement, it is unclear how an arbitrator would be appointed if the Parties do not agree upon an individual.

[35] The Court acknowledges that this inconsistency could be remedied by the FAA or a statutory gap-filler. See Deaton Truck Line, Inc. v. Local Union 612, Affiliated with the Int'l. Bhd. of

Third, and similar to *Ragab*, the First Arbitration Agreement requires a thirty (30)-day notice period before proceeding to arbitration (Ex. 1, ¶ 3), whereas the Second Arbitration Agreement requires only twenty (20) days (Ex. 2, ¶ 3). Additionally, under the Arbitration Agreements, if a party files an answering statement after the expiration of the notice period, the opposing party selects the arbitrator. (Ex. 1, ¶ 4; Ex. 2, ¶ 4). Thus, the Arbitration Agreements conflict with each other.

Fourth, and similar to *NAACP*, the First Arbitration Agreement provides that "[t]he arbitration shall be held in Rankin County, Mississippi, unless the [b]orrower requests in the demand for arbitration or the answering statement, the arbitration to be held in his, her, or its county of residence or principal place of business." (Ex. 1, ¶ 5). The Second Arbitration Agreement, however, provides automatically for the arbitration to be held in the borrower's county of residence (Ex. 2, ¶ 5). The Arbitration Agreements, therefore, are inconsistent.

Fifth, and similar to *Ragab* and *NAACP*, the First Arbitration Agreement provides that the "[l]ender shall pay the arbitrator's fees and expenses for the first two days of hearings." (Ex. 1, ¶ 4) Further, the First Arbitration Agreement provides that "[i]n his decision or award, the arbitrator shall direct the parties to pay

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Teamsters, Chauffeurs, Warehousemen and Helpers of Am., 314 F.2d 418 (5th Cir. 1962) (compelling arbitration when the agreement did not name an arbitrator because the FAA provides a mechanism for the selection of an arbitrator when the parties are unable to agree upon an individual).

his or her fees and other costs according to the relative fault of the parties." (*Id.*) Thus, the First Arbitration Agreement is internally inconsistent. While the document requires Tower Loan to pay the arbitrator's fees and expenses for the first two days of hearings, the arbitrator is also required to apportion his fees and costs between the Parties in accordance with their relative fault. In theory, then, the Debtor could be responsible for paying the entirety of the arbitrator's fees and costs. Additionally, the Second Arbitration Agreement provides that "the [c]ompany shall pay all costs of the arbitration," excluding attorneys, experts, and witness fees and expenses (Ex. 2, ¶ 4). The Arbitration Agreements, therefore, conflict with each other. The Court is unable to discern whether Tower Loan pays none, some, or all of the costs under the Arbitration Agreements.[36]

Sixth, and similar to *Ragab* and *NAACP*, the First Arbitration Agreement does not address which party is responsible for paying attorneys, experts, and witness fees and expenses. The Second Arbitration Agreement,

[36] At the Hearing, Tower Loan asserted that it will pay the fee to initiate arbitration and all costs and fees of the arbitration. Tower Loan cannot, after acknowledging that the Arbitration Agreements contain inconsistencies, arbitrarily choose the provision more favorable to the Debtor in an attempt to force him into arbitration. *See Sullivan v. Protex Weatherproofing, Inc.*, 913 So. 2d 256, 265 (Miss. 2005) (quoting *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 10 (1st Cir. 2004) ("No one can seriously argue that clauses can be plucked at random from one agreement and inserted into the other."). To form a contract, the material terms must be "sufficiently definite," and the parties must achieve a meeting of the minds with respect to the agreement. *See Union Planters Bank, Nat'l. Ass'n*, 912 So. 2d at 120; *Rotenberry*, 864 So. 2d at 270.

however, provides that "each party must bear the cost of its own attorneys, experts and witness fees and expenses," unless the arbitrator chooses to award otherwise (Ex. 2, ¶ 4). Thus, the Arbitration Agreements are inconsistent.

Seventh, the First Arbitration Agreement does not require the lender "to initiate arbitration proceedings for collection matters of $10,000 or less or before repossessing collateral or foreclosing upon real property. However, disputes arising out of or relating to foreclosure or repossession of collateral shall be arbitrated." (Ex. 1, ¶ 8). The Second Arbitration Agreement contains no such carve out. The Arbitration Agreements, therefore, are inconsistent and suggest that all material terms are not "sufficiently definite."

While Justice Gorsuch raised many concerns in *Ragab*, the Court can distinguish his dissent from the issues raised in the Adversary. First, the Debtor is not a sophisticated party. The Debtor is a truck driver and mechanic who was not represented by counsel when he signed the Arbitration Agreements (Adv. Dkt. 17). Further, and unlike the plaintiff in *Ragab*, the Debtor did not participate in the negotiation or drafting of the Loan Agreement and the Arbitration Agreements—these documents were created by Tower Loan. Accordingly, the claims in the Adversary arise out of a consumer, rather than a commercial, transaction. Second, and unlike the defendants in *Ragab*, Tower Loan has not acknowledged that the Debtor's claims fall within the scope of the Second Arbitration Agreement. Instead, Tower Loan maintains that the Second Arbitration Agreement governs only claims

against insurance companies arising out of insurance policies. Tower Loan desires to proceed exclusively under the First Arbitration Agreement. The Debtor, therefore, "would [not] be free to initiate arbitration under the terms of whichever . . . agreement[] he prefers." *See Ragab*, 841 F.3d at 1139 (Gorsuch, J., dissenting). Additionally, the Arbitration Agreements each contain both favorable and unfavorable provisions with respect to the Debtor. For the Debtor to proceed unprejudiced, he would need to "pick and choose" provisions from each agreement to govern the arbitration. Third, while courts have compelled arbitration where the agreement included only a provision requiring arbitration,[37] the Arbitration Agreements, like those in *Ragab*, contain "multiple, specific, conflicting arbitration provisions, and not one general or vague arbitration clause." *Ragab*, 841 F.3d at 1138. Although the FAA and other statutory authority provide mechanisms to fill gaps in an otherwise valid agreement, they are unable to reconcile the multiple, specific, inconsistent and conflicting provisions contained in the Arbitration Agreements. Lastly, because the Adversary involves a consumer transaction, an analogy to the "mirror image" rule, rather than the "battle of the forms" doctrine or "knockout rule" governed by the Uniform Commercial Code, is more applicable. *See In re Whatever, LLC*, 478 B.R. 700, 709 (Bankr. W.D. Pa. 2012) ("The 'knockout rule' is a statutory exception to the mirror image rule . . . [and] only applies to transactions in goods."). The

[37] *See Guthrie v. Barda*, 533 P.2d 487, 487 (Colo. 1975) (compelling arbitration when the agreement stated only that claims "shall be submitted to binding arbitration").

mirror image rule, which controls at common law, states that a contract forms where there is an "unconditional acceptance of the offer." *Sutter-Van Horn Co. v. Miss. Home Tel. Co.*, 69 So. 996, 997 (Miss. 1915). Additionally, "not only must the acceptance be unconditional, but it must be identical with the terms of the offer. It must not vary from the proposal, either by way of omission, addition, or alteration. If it does, neither party is bound." *Id.* (quoting 1 ELLIOT ON CONTRACTS §§ 37, 38; LAWSON ON CONTRACTS § 25 (2d ed.)). Thus, consumer transactions are held to a standard of higher specificity and clarity than commercial transactions.

Turning to Tower Loan's argument at the Hearing, Mississippi recognizes the duty-to-read doctrine. *See Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 726 (Miss. 2002) ("In Mississippi, a person is charged with knowing the contents of any document that he executes."); *see also Cont'l Jewelry Co. v. Joseph*, 105 So. 639, 639 (Miss. 1925) ("A person cannot avoid a written contract which he has entered into on the ground that he did not read it or have it read to him, and that he supposed its terms were different, unless he was induced not to read it or have it read to him by fraudulent representations made to him by the other party, on which he was entitled to rely."). While the Parties did not present to the Court any evidence of fraudulent misrepresentation on behalf of Tower Loan, the Arbitration Agreements contain numerous materially inconsistent and conflicting provisions. As a result, a prudent purchaser reading the Arbitration Agreements would likely obtain only a generalized sense that arbitration would resolve his or her claims

because the Arbitration Agreements "do not plainly convey—with precision and consistency—what the exact terms and conditions of that arbitration process would be." *NAACP of Camden Cty. E.*, 24 A.3d at 794. Since Mississippi law requires a contract's material terms to be "sufficiently definite," the Court follows *Ragab* and finds that the conflicting and inconsistent Arbitration Agreements indicate that the Parties did not achieve a meeting of the minds with respect to arbitration—the dispute could be governed by one or three arbitrators; either the court or a dispute resolution company that has since been renamed and no longer services consumer arbitration disputes will choose the arbitrator if the Parties cannot agree on a candidate; the notice period to deliver an answering statement to the other party is either thirty (30) days or twenty (20) days, and there are consequences if the answering statement is not timely filed; the Debtor might be required to request that the arbitration be held in his county of residence; Tower Loan might pay no costs, two days of costs, or all costs of the arbitration; the Debtor might be responsible for paying all attorneys, experts, and witness fees; and Tower Loan might not be bound to arbitrate claims for collection matters of $10,000 or less, before repossessing collateral or foreclosing upon real property.[38]

[38] Having reached this conclusion, it is unnecessary for the Court to consider the unconscionability argument raised by the Debtor in the Debtor's Response but largely abandoned at the Hearing.

B. Does the Arbitration Agreement contain a delegation clause requiring the Parties' claims to proceed to arbitration?

Because the Court finds that no valid agreement to arbitrate exists, it does not need to reach the issue of whether the Arbitration Agreement actually contains a delegation clause requiring the Parties' claims to proceed to arbitration for the arbitrator to decide gateway arbitrability issues.

Conclusion

For the above and foregoing reasons, the Court concludes that no actual agreement to arbitrate exists because the Parties did not achieve a meeting of the minds as to how to arbitrate claims under the Arbitration Agreements. A separate final judgment shall be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

##END OF OPINION##

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

CASE NO. 17-00160-NPO
CHAPTER 7

ADV. PROC. NO. 17-00025-NPO

[Filed December 12, 2017]

IN RE: CHUCK WILLIS,	)
	)
DEBTOR.	)
	)
CHUCK WILLIS	)
	)
PLAINTIFF	)
	)
VS.	)
	)
TOWER LOAN OF MISSISSIPPI, LLC, d/b/a TOWER LOAN OF CRYSTAL SPRINGS	)
	)
DEFENDANT	)
	)

[SEAL] **SO ORDERED,**

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: December 12, 2017

The Order of the Court is set forth below. The docket reflects the date entered.

FINAL JUDGMENT DENYING DEFENDANT TOWER LOAN'S MOTION TO DISMISS OR, ALTERNATIVELY, TO COMPEL ARBITRATION AND TO DISMISS OR STAY CLAIMS PENDING ARBITRATION

Consistent with the Court's Memorandum Opinion and Order on Defendant Tower Loan's Motion to Dismiss or, Alternatively, to Compel Arbitration and to Dismiss or Stay Claims Pending Arbitration (Adv. Dkt. 27) entered on December 12, 2017,

IT IS HEREBY ORDERED AND ADJUDGED that final judgment is entered denying the Defendant Tower Loan's Motion to Dismiss or, Alternatively, to Compel Arbitration and to Dismiss or Stay Claims Pending Arbitration (Adv. Dkt. 8) filed by Tower Loan of Mississippi, LLC.

##END OF FINAL JUDGMENT##

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-60344

[Filed January 10, 2020]

In the Matter of: CHUCK WILLIS	)
	)
Debtor.	)
	)
TOWER LOAN OF MISSISSIPPI, L.L.C., Doing Business as Tower Loan of Crystal Springs,	)
	)
Appellant,	)
	)
v.	)
	)
CHUCK WILLIS,	)
	)
Appellee.	)

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

ON PETITION FOR REHEARING EN BANC

(Opinion Dec 12, 2019, 5 Cir., 2019, 944 F.3d 577)

Before OWEN, Chief Judge, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
/s/
UNITED STATES CIRCUIT JUDGE