Nos. 23-6218 & 24-6043

In the United States Court of Appeals for the Tenth Circuit

SUSAN PARISI,
Plaintiff-Appellee

v.

GREENSKY, LLC; OKLAHOMA WINDOWS AND DOORS LLC D/B/A RENEWAL BY ANDERSEN OF OKLAHOMA,
Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Oklahoma (Hon. David L. Russell), No. 5:23-cv-00115-R

Oral argument requested

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STATEMENT OF PRIOR OR RELATED CASES

There have been no prior or related appeals.

INTRODUCTION

Susan Parisi received an enticing advertisement: she could upgrade her home's windows for no money down and no payments or interest for two years. That sounded like a great deal, particularly because Ms. Parisi, a veteran, would be starting chemotherapy for multiple myeloma soon, making it difficult to afford the needed upgrades. She responded to the ad, and a salesperson from Renewal by Anderson of Oklahoma (RBA) soon came to her home. He assured her that her project was eligible for the advertised loan and, she thought, helped her apply for that loan using his iPad. It turns out, however, that RBA's financing partner, GreenSky, LLC (GreenSky), determined that Ms. Parisi qualified for a markedly different loan with an interest rate of almost 25% and payments starting within six months. Following a bait-and-switch scheme well documented by federal regulators, RBA claimed that, by signing the salesperson's iPad, Ms. Parisi had not just applied for a loan but also contractually agreed to purchase windows regardless of the financing terms. And GreenSky claimed that RBA had accepted the high-interest loan on Ms. Parisi's behalf when it directly charged the loan account more than $8,000 for the windows project (which RBA never started).

After trying and failing to dispute that she authorized RBA to move forward with the windows project using the high-interest loan, Ms. Parisi sued, bringing a class action for violations of Oklahoma's consumer protection laws on behalf of

herself and other Oklahomans harmed by these practices. But rather than address the merits of Ms. Parisi's claims in court, Defendants sought to compel arbitration, citing arbitration clauses in the alleged agreement to purchase windows from RBA (the Windows Contract) and the high-interest loan serviced by GreenSky (the Loan Agreement). The district court rejected these efforts, correctly concluding that Defendants failed to show that any arbitration agreements were formed.

Despite Defendants' arguments on appeal, their motions raised straightforward questions regarding the fundamental elements of contract formation under Oklahoma law that are properly decided by a court, not an arbitrator. To show that an arbitration agreement was formed under Oklahoma law, Defendants must prove mutual assent, which means both that Ms. Parisi had reasonable notice of the terms on offer and that the parties agreed on the same material terms, and consideration. They've failed to prove these basic requirements. As such, the district court correctly held that no arbitration agreements existed, and thus there was no basis to compel arbitration. This Court should affirm.

STATEMENT OF THE ISSUES

1. Did the district court correctly deny RBA's motion to compel arbitration because it failed to show that an arbitration agreement was formed?

2. Did the district court correctly deny GreenSky's motion to compel arbitration because it failed to show that an arbitration agreement was formed?

STATEMENT OF THE CASE

I. Factual Background

A. GreenSky and RBA's business model

GreenSky is a financial technology company that services and manages consumer loans through its "GreenSky Program." App. Vol. 1 at 81, ¶ 8.[1] Financial institutions—including BMO Harris Bank, NA, which originated the loan at issue in Ms. Parisi's case, *id.* at 68—make consumer loans through the program, *id.* at 81, ¶¶ 7-8. GreenSky also works with merchants to market GreenSky Program loans to consumers as a means of financing their products, and to accept applications for the loans from consumers at the point of sale. *See, e.g.*, *id.* at 82, ¶ 12. As one of those merchants, RBA, which manufactures and sells replacement windows and doors, advertises the ability to finance the cost of its products and services. *Id.*; App. Vol. 3 at 623, ¶ 4.

Consumers usually deal directly with merchants rather than GreenSky or GreenSky Program financial institutions. App. Vol. 2 at 506; App. Vol. 1 at 113-14 ¶¶ 43-49. For example, an RBA salesperson meets with the consumer in their home, enters the consumer's personal information into GreenSky's mobile application using an RBA iPad, and then submits that information as part of a loan application

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[1] Pursuant to 10th Circuit Rule 28.1(A)(1), references to the appendix are cited as "App. Vol. [Number] at [Page Number]."

on behalf of the consumer. App. Vol. 1 at 82, ¶¶ 13-14; App. Vol. 3 at 623-26, ¶¶ 4-23. Once this information is submitted through the mobile application and GreenSky has pulled the consumer's credit report, GreenSky's "decisioning software [] applies the various credit policies of the participating financial institutions" to make a quick financing decision on the loan application. App. Vol. 1 at 83, ¶ 16.

When a consumer is approved for a loan, GreenSky activates a "Shopping Pass," which functions like a credit card. *Id.* at 115, ¶ 51. Because merchants have access to the Shopping Pass account number, either the consumer or the merchant can initiate a Shopping Pass transaction. *Id.* at 115, ¶ 52; App. Vol. 2 at 506. When that happens, the loan funds are disbursed directly to the merchant to pay for the home improvement project, sometimes without the consumer's knowledge. *Id.* GreenSky treats use of the Shopping Pass as acceptance of the loan terms, thereby forming a Loan Agreement. App. Vol. 1 at 85, ¶ 29; *Id.* at 68, 70.

GreenSky's business practices drew the attention of the Consumer Financial Protection Bureau (CFPB), which determined that the company was enabling merchants to take out loans on behalf of consumers who did not request or authorize them. *See generally* Consent Order, *In the Matter of GreenSky, LLC*, CFPB No. 2021-CFPB-0004 (July 12, 2021) (*available at* App. Vol. 1 at 198-254); *see also* App. Vol. 1 at 207, ¶¶ 20-22; *id.* at 208, ¶ 25 (GreenSky received approximately 6,000 consumer complaints in a five-year period stating that they did not authorize

the submission of a loan application).[2] In July 2021—a few months before Ms. Parisi came into contact with RBA—the CFPB issued a consent order against GreenSky, requiring it to refund or cancel millions of dollars in loans, pay a civil penalty, and implement procedures to prevent such abuse going forward. *Id.* at 217-39.

The CFPB described a system in which GreenSky allowed merchants to bypass consumers entirely by submitting loan applications on their behalf without authorization, using the Shopping Pass to accept the offered loan without authorization, and then receiving the loan funds directly without consumers' knowledge—that is, until GreenSky tried to collect payment. *Id.* at 205-10, ¶¶ 9-32. And even when consumers were aware that a merchant had helped them submit a loan application, the CFPB found that they could see the actual terms of the offered loan only if that merchant showed them to the consumer on the iPad screen, which often didn't happen. *Id.* at 206, ¶ 14. As a result, because they had access to the

[2] Although the district court declined to rely on the CFPB's consent order in denying GreenSky's motion to compel arbitration, *see* App. Vol. 2 at 519 n.14, the order has been part of this case's record since May 1, 2023, when Ms. Parisi attached it to her reply in support of her motion to remand, *see* Dist. Ct. ECF 19-1. GreenSky did not object to the consent order then, waiting instead until September, after Ms. Parisi relied on it again when opposing GreenSky's motion to compel arbitration. *See* Dist. Ct. ECF 43. This Court may take judicial notice of matters of public record, including "an administrative agency's publicly available files." *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1213 (10th Cir. 2012).

Shopping Pass, merchants could accept a loan with very different terms than what the consumer thought they'd applied for. *See id.* at 206-07, ¶¶ 16-18.

That's what happened to Ms. Parisi here.

B. Ms. Parisi's meeting with an RBA salesperson

In late 2021, Ms. Parisi saw an advertisement from RBA that offered to replace windows for zero money down and zero interest or payments for 24 months after installation. App. Vol. 3 at 624, ¶¶ 4, 7. Soon after, she met with an RBA salesperson in her home. *Id.* at 624, ¶ 4.[3] They discussed her interest in upgrading her windows and her need for the advertised financing because she would soon be undergoing chemotherapy to treat her multiple myeloma. *Id.* at 624-25, ¶¶ 5-7. The RBA salesperson "confirmed" that Ms. Parisi would be "eligible for the advertised Zero-Interest Loan from GreenSky, a frequent financier of [RBA] projects." *Id.* at 686 (citing *id.* at 624, ¶ 7). He then told Ms. Parisi that she "would need to sign a credit application" on his iPad to proceed and that "the iPad would be used to secure [her] signature authorizing a credit review." *Id.* at 624, ¶ 8; *id.* at 624, ¶¶ 9-10. Hoping to obtain the zero-interest loan, she "agreed to sign." *Id.* at 624, ¶ 10. The salesperson did not provide Ms. Parisi with any disclosures about electronic signatures, get her consent to proceed with the transaction electronically, or say that

[3] RBA did not respond to or dispute Ms. Parisi's testimony regarding her interactions with its salesperson.

her electronic signature would be used for anything other than the credit check and loan application. *Id.* at 624, ¶¶ 11-12.

She signed the iPad screen once. *Id.* at 625, ¶ 15. The salesperson then said he needed "additional signatures to secure" the zero-interest loan. *Id.* at 625, ¶ 16. He directed Ms. Parisi to check a box to affix her original electronic signature onto the line next to the box approximately 12 times. *Id.* at 625, ¶¶ 17-18. When she did so, the "only thing visible on the iPad screen" was the signature line or check box next to a signature line. *Id.* at 625, ¶ 17. As such, she "was not able to see what [she] was signing." *Id.*; *see also id.* at 686-87. The RBA representative did not give Ms. Parisi a hard copy of contract terms to review before or after signing and did not explain the terms or that they contained an arbitration clause. *Id.* at 625, ¶¶ 19-20. Rather, he said only that her signatures would be used for the "credit check and the loan application." *Id.* at 624, ¶ 13. As such, by signing on the iPad, Ms. Parisi "only ever intended to apply for a loan requiring zero money down, zero interest for 24 months, and zero payments for 24 months after [her] windows were installed"; she did not intend to accept a contract of any kind. *Id.* at 625, ¶ 21.

When Ms. Parisi had signed a dozen or so times, the RBA salesperson "immediately took the iPad" and called a GreenSky representative, who confirmed Ms. Parisi's personal information and said she'd call back soon. *Id.* at 626, ¶¶ 22, 23. A few minutes later, she called back to say Ms. Parisi had "been approved for

the 2-year loan program with GreenSky," but not mentioning any other loan terms. *Id.* at 626, ¶¶ 26, 27; *see also* App. Vol. 1 at 083, ¶ 17. After that, Ms. Parisi did not sign anything else, nor was she provided with any additional purchase or loan terms before the salesperson left. App. Vol. 3 at 626, ¶ 28.

On his way out, the RBA salesperson said he would mail Ms. Parisi a copy of the contract to purchase windows, *id.* at 626, ¶ 29, which she understood would give her time to review and consider it before agreeing. Rather than mailing a copy, RBA emailed her a copy of the Windows Contract she purportedly signed using the iPad, but she did not see the email because it went to her spam folder. *Id.* at 627, ¶¶ 30-32; *Id.* at 584.

C. The purported Windows Contract between RBA and Ms. Parisi

The Windows Contract is a thirty-page document that states that the buyer (Ms. Parisi) "agrees to purchase the products and/or services . . . in accordance with the terms and conditions described in this Agreement Document and Payment Terms, any documents listed in the Table of Contents, and any other document attached to this Agreement Document." App. Vol. 3 at 554. Among the documents listed in the table of contents or attached to the Agreement Document are the GreenSky Financing Form, the HOA Authorization and Contact Form, and the Terms and Conditions of Sale. *Id.* at 553, 557-61. Ms. Parisi's electronic signature appears 14 times in the Windows Contract but the signatures on the financing form

and the HOA authorization are not hers, and she believes they were forged. *Id.* at 627, ¶¶ 34-38 (describing *id.* at 557-58).

The Agreement Document and Payment Terms lists the total price as $17,743 and specifies that Ms. Parisi's "Method of Payment" will be "Financing." *Id.* at 554. The Terms and Conditions of Sale contains an arbitration clause providing that "Buyer and Contractor [RBA] agree that any dispute between them . . . arising under or in connection with this Agreement, or the products and services to be provided by Contractor . . . will be determined by binding arbitration." *Id.* at 560-61.

The GreenSky Financing Form states that Ms. Parisi's loan "Plan" is "24 month promotional period. Interest waived if balance paid off before promotional period ends" (*id.* at 557)—that is, "the Zero-Interest Loan for which Parisi applied," *id.* at 688. A few days after their meeting, however, the RBA salesperson called Ms. Parisi to say "he did not know what happened" but that she had not been approved for the zero-interest loan. *Id.* at 628, ¶ 39. She never heard from him again.

D. The purported GreenSky Program Loan Agreement

After the RBA salesperson submitted Ms. Parisi's loan application and Ms. Parisi was approved for a loan, GreenSky mailed a printed copy of the Loan Agreement to Ms. Parisi on November 23, 2021, App. Vol. 1 at 83, ¶ 18, which she received after November 29, App. Vol. 3 at 628, ¶ 43.

GreenSky also emailed Ms. Parisi on November 21 three times within five minutes: the first two emails prompted Ms. Parisi to "Activate Your Loan!" and the third email congratulated her on "Activating Your Loan," *id.* at 641-46, even though she had not done anything to "activate" the loan. *Id.* at 629, ¶ 51; *see also id.* at 641-46. The third email said Ms. Parisi would need to register on the GreenSky Customer Portal so that, among other things, she could "review and save/print" the loan documents. *Id.* at 645. She did not see or open these emails because they went to her spam folder, nor did she register for an account. *Id.* at 628-29, ¶¶ 43, 51; *id.* at 689.

The Loan Agreement Ms. Parisi eventually received in the mail offered her a loan from BMO Harris Bank and serviced by GreenSky. App. Vol. 1 at 81, ¶¶ 7-8. The agreement, which is signed only by BMO Harris Bank as the "Lender," stated, "THIS IS A DIFFERENT PLAN THAN REQUESTED." *Id.* at 68, 70. Instead of the zero-interest loan Ms. Parisi expected, it required payments beginning in six months, charged an annual percentage rate of 24.99%, and estimated a total cost of $37,717.08 for the life of the $17,744 loan. *Id.*; *Id.* at 70; *see also* App. Vol. 3 at 689. It also stated that the "first use" of the "Shopping Pass . . . constitutes acceptance by (all) Borrower(s) of the terms of the accompanying Loan Agreement." App. Vol. 1 at 68, 70. The agreement requires arbitration of all claims "between you and us arising from or relating to your Loan Agreement as well as the relationship resulting

from such Agreement." *Id.* at 73. "Us" is defined to include anyone "providing any product, service, or benefit in connection with the Agreement." *Id.*

On the morning of November 29—before Ms. Parisi received the mailed copy of the Loan Agreement—her Shopping Pass was used, disbursing $8,871.50 directly to RBA. *Id.* at 85-86, ¶¶ 28, 30; *Id.* at 101. Ms. Parisi was notified of the Shopping Pass transaction by email (and, later, mail), and she immediately contacted GreenSky's customer service to dispute the transaction. App. Vol. 3 at 628, ¶¶ 41-42; *id.* at 635. During Ms. Parisi's exchanges with customer service, GreenSky stated that the transaction occurred because the "merchant charges a percentage upfront on the loan." *Id.* at 638. Ms. Parisi reiterated that she "was told there would NOT be a payment, NO interest, and etc. for two years . . . I am NOT authorizing any payment at this time[.]" *Id.* After GreenSky again tried to confirm that Ms. Parisi would "authorize this transaction," Ms. Parisi responded unequivocally that she did not authorize the use of the Shopping Pass for a loan she did not apply for, *id.* at 639:

> You did NOT explain any loan process to me and I do NOT authorize any transaction which I have already stated. I do NOT do well with lies. I have many questions related to this situation. I was told I qualified for a 24 month, NO money down, No Interest, and NO payment situation to begin 24 months after installation, now I am being told I did NOT qualify for that and you have removed that original offer. Well this is to inform you again that I am NOT doing business with you or [RBA] and IF you sent them money without my consent that is ON you NOT me. I did NOT authorize anything.

Over these objections, GreenSky billed her and assessed late fees in accordance with the high-interest Loan Agreement. App. Vol. 1 at 101. RBA never replaced Ms. Parisi's windows even though it was disbursed almost $9,000. App. Vol. 3 at 629, ¶ 47. After almost a year, GreenSky informed Ms. Parisi that the loan would be cancelled. *Id.* at 629, ¶ 49. Even so, at the time she filed the operative complaint, Ms. Parisi's credit report still reflected an outstanding balance owed to BMO Harris Bank. *Id.* at 629, ¶ 50.

II. Procedural Background

A. Ms. Parisi brought class claims against GreenSky and RBA for violations of Oklahoma law.

After trying and failing to correct the situation with GreenSky directly, Ms. Parisi filed this action against GreenSky in Oklahoma state court, seeking to certify a class for claims for injunctive and monetary relief. App. Vol. 1 at 42-58. GreenSky removed the action to federal court, *id.* at 3, and Ms. Parisi amended her complaint to add RBA as a defendant, *id.* at 103-22.

Her complaint challenges RBA's and GreenSky's pattern of unlawful and deceptive consumer practices. *Id.* at 106, ¶ 11. In particular, the complaint alleges that Defendants failed to provide adequate consumer credit disclosures, including about the interest rates consumers would be required to pay, in violation of the Oklahoma Consumer Credit Code. *Id.* at 105-06, ¶ 10. It references the CFPB's detailed findings about the GreenSky Program's problems with rampant fraud, *id.* at

119, ¶ 85, and explains how Ms. Parisi's experience fits within that broader scheme, *id.* at 113-19, ¶¶ 42-85

B. GreenSky moved to compel arbitration, which the district court denied.

In April 2023, GreenSky moved to compel arbitration and dismiss or stay Ms. Parisi's claims based on the arbitration clause contained in the high-interest Loan Agreement. App. Vol. 1 at 16-40. Ms. Parisi opposed that motion on the ground that GreenSky "failed to prove the existence of an agreement to arbitrate." *Id.* at 132. In particular, she explained that she had intended to apply only for zero-interest financing, that she lacked notice of any terms of the Loan Agreement apparently offered to her, including its arbitration clause and the purported delegation clause within it, and that she had not agreed to those terms by using the Shopping Pass. *Id.* at 145-50. GreenSky responded, conceding that Ms. Parisi had not been bound to the Loan Agreement when she received it by email and mail but countering that the use of the Shopping Pass—whether by Ms. Parisi or by RBA—constituted acceptance of the terms of the Loan Agreement, including the arbitration clause GreenSky sought to enforce. *Id.* at 277-78.

The district court denied GreenSky's motion to compel arbitration on December 1, 2023. App. Vol. 2 at 505.[4] After providing a detailed chronology of facts, *id.* at 512-13, the court concluded that GreenSky failed to satisfy its burden of proving that an agreement to arbitrate existed, *id.* at 514. It explained that GreenSky could show acceptance of the terms of the Loan Agreement, including its arbitration provision, in "one of two ways," but that GreenSky failed to show either. *Id.* at 515. As the district court found, the company "provided no evidence that Parisi herself initiated the Shopping Pass transaction" or that RBA was authorized to accept a high-interest loan on her behalf. *Id.* at 516 n.11. Finally, the court held that a summary trial on formation was not necessary because it could conclude as a matter of law that GreenSky failed to carry its burden and show that Ms. Parisi had agreed to arbitrate. *Id.* at 519.

C. RBA also moved to compel arbitration, which the district court also denied.

In December 2023, RBA moved to compel arbitration based on the arbitration clause in the Windows Contract and to dismiss or stay Ms. Parisi's claims pending

[4] While its motion to compel arbitration was pending, GreenSky also filed a motion to dismiss based on its reasons for compelling arbitration. App. Vol. 1 at 284-96. The district court denied that motion when it denied the motion to compel arbitration. App. Vol. 2 at 505.

arbitration. App. Vol. 3 at 521.[5] As proof that the parties formed the Windows Contract and its arbitration agreement, RBA attached the contract and emphasized that Ms. Parisi's electronic signature appeared on many of the pages. *Id.* at 549-551. The company also noted that it emailed the contract to Ms. Parisi, even if it went to her spam folder. *Id.* at 584. But it did not provide any evidence of the interface it used to obtain Ms. Parisi's signature on what it claims was the Windows Contract and not solely a credit check and loan application.

Ms. Parisi opposed that motion, supported by a detailed declaration regarding her interactions with the RBA representative and what she could see on the iPad. *See id.* at 623-31. She argued that she lacked notice that she was signing anything other than a credit check authorization and loan application, let alone that she was agreeing to a contract to purchase windows that contained a term waiving her right to bring legal claims in court. *Id.* at 607-08. She also argued that the parties did not agree on the same material terms because she meant to apply only for a zero-interest loan, but

[5] Although its motion to compel arbitration had just been denied, GreenSky moved to join RBA's motion to compel arbitration. *See id.* at 585-88. The district court granted that request over Ms. Parisi's objection, but described it as futile because it denied RBA's motion to compel arbitration. *Id.* at 685 n.1. GreenSky also moved for reconsideration of the district court's decision denying its motion to compel arbitration on the basis that the arbitration clause in the Windows Contract also covered Ms. Parisi's claims against GreenSky. *Id.* at 648, 651. Shortly after the district court denied RBA's motion to compel arbitration, it denied this request too. *Id.* at 696. GreenSky did not appeal this denial.

RBA now sought to enforce the arbitration clause in a contract with high-interest financing. *Id.* at 611. She concluded by arguing that the arbitration clause lacked consideration and did not comply with federal and state electronic signature requirements, and that two of the electronic signatures in the contract were not hers and therefore forged. *Id.* at 612, 614-15; *id.* at 327, ¶¶ 34-38. RBA did not file a reply or dispute Ms. Parisi's detailed declaration.

On February 14, 2024, the district court denied RBA's motion to compel arbitration because, like GreenSky, RBA failed to meet its burden of proving the existence of an arbitration agreement. *Id.* at 685. The court focused on mutual assent and consideration but acknowledged that Ms. Parisi had also identified other reasons why she had not formed an arbitration agreement. As to mutual assent, the district court found that the zero-interest financing was an "essential element" of any agreement to purchase windows, *id.* at 692, but that RBA was now seeking to enforce the terms of the Windows Contract based on materially different financing, *id.* at 693. As such, the court concluded, the parties did not come to a mutual agreement on this essential term. Consideration also fell short, the court concluded, because RBA's "bargain was illusory." *Id.* at 694. And again, the district court rejected the need for a summary trial on any formation questions because RBA "present[ed] little factual evidence at all" and the evidence it did present wasn't sufficient. *Id.*

Both GreenSky and RBA appealed the district court's orders denying their respective motions to compel arbitration. App. Vol. 3 at 655, 699. This Court procedurally consolidated Defendants' appeals. *See* Order, 10th Cir. ECF 1001106557 (Mar. 15, 2024).

SUMMARY OF ARGUMENT

Because arbitration is a matter of contract," *Coinbase, Inc. v. Suski*, 144 S. Ct. 1186, 1192 (2024), the first question that any court reviewing a motion to compel arbitration must answer—and the one that proves dispositive here—is whether the parties formed an agreement to arbitrate, *id.* at 1193. The district court properly started and ended with that question, concluding that Ms. Parisi did not form agreements to arbitrate that could be enforced by either Defendant.

Defendants argue that the district court instead should have delegated Ms. Parisi's challenges to the arbitrator because the arbitration provisions contain clauses that they contend delegate questions of arbitrability to the arbitrator ("delegation clauses"). But this Court has squarely held that questions of formation are for a court to decide even if there is a delegation clause: the fundamental rule that *a court* decides questions of formation holds true whether the agreement is to arbitrate the merits or to arbitrate questions of arbitrability.

Defendants attempt to avoid that rule by recasting Ms. Parisi's challenges as concerning the validity or enforceability of the Windows Contract and Loan

Agreement as a whole, and not the respective arbitration agreements specifically. That's wrong. For one, Ms. Parisi opposes arbitration on quintessential formation grounds—mutual assent and consideration. And the Supreme Court has made clear that a challenge to the *making* of a contract does not have to be specific to the arbitration provision or delegation clause. What's more, Ms. Parisi's formation challenges *do* apply specifically to the arbitration and delegation clauses; they just also apply to the container contracts as a whole. As the Supreme Court recently confirmed, "where a challenge applies 'equally' to the whole contract and to an arbitration or delegation provision," that challenge is for the court to decide. *Suski*, 144 S. Ct. at 1194 (citation omitted).

As the parties seeking to compel arbitration, RBA and GreenSky have not met their burden of proving that an arbitration agreement exists. Forming a contract in Oklahoma requires mutual assent and consideration, and neither agreement to arbitrate has both of those elements.

Starting with RBA, its sole evidence that Ms. Parisi agreed to arbitrate her claims is that it affixed her electronic signature to the Windows Contract. But it has provided no evidence whatsoever that Ms. Parisi saw—or could have seen—the terms of the contract, including its arbitration and delegation clauses, prior to her purportedly agreeing to them. And, in fact, it is undisputed that she thought and was told that, by signing the iPad screen and checking a series of boxes, she was agreeing

only to a credit check for her loan application, not to purchase windows or arbitrate her claims. That fails the basic notice component of mutual assent.

But even if RBA had provided reasonable notice of the contract terms, the parties did not mutually agree on the essential financing term of the Windows Contract. The contract RBA initially offered was materially different than the contract it now seeks to enforce because the former was financed by a zero-interest loan while the latter a high-interest loan. The agreement RBA seeks to enforce also lacks mutual assent because it engaged in fraud in the execution by misrepresenting what Ms. Parisi was signing and because it failed to comply with federal and Oklahoma electronic signature laws.

And if RBA is right that it could change the financing term without notice or a new signature from Ms. Parisi, then the district court correctly concluded that the Windows Contract lacked consideration because RBA's obligations under the contract were empty promises that it could change at any time.

Nor is there an agreement to arbitrate for GreenSky to enforce. GreenSky seeks to compel arbitration based on the arbitration clause in the Loan Agreement between Ms. Parisi and BMO Harris Bank, which GreenSky never signed. Despite not being a signatory to the Loan Agreement, it contends that it is a "party" to the arbitration clause such that the district court should have focused on the formation of that clause only. That argument is irrelevant because no arbitration agreement was

formed for the same reasons no overall contract was formed. And it's wrong as a matter of contract formation: GreenSky may be able to enforce the arbitration clause as a third-party beneficiary or under another non-signatory theory, but it can do so only if a contract was formed between Ms. Parisi and BMO Harris Bank in the first place.

It was not. GreenSky has not met its burden of proving that Ms. Parisi had notice of the Loan Agreement, let alone its arbitration and delegation clauses, at the time RBA used the Shopping Pass. The company failed to rebut Ms. Parisi's testimony that she received the mailed copy of the Loan Agreement *after* the Shopping Pass was used, and the emails it sent went to her spam folder. And even if she had seen the emails, they failed to provide any indication that she was being offered a loan agreement with an arbitration clause that she could accept by using the Shopping Pass or allowing the Shopping Pass to be used by RBA.

Moreover, even if GreenSky could establish that Ms. Parisi had notice of the Loan Agreement's terms and how to accept them, it has not shown that she agreed to those terms. Ms. Parisi could accept the terms of the Loan Agreement either by using the Shopping Pass herself or by authorizing RBA to do so on her behalf. But as soon as she discovered the Shopping Pass had been used, Ms. Parisi vigorously denied authorizing such a transaction. And whatever authorization RBA had based on its initial interactions with Ms. Parisi extended only as far as accepting a zero-

interest loan and no farther. Thus, this Court should affirm the district court's conclusion that no Loan Agreement was formed, and that GreenSky cannot compel arbitration as a non-signatory based on the arbitration clause in that agreement.

ARGUMENT

I. Standard of Review

This Court reviews a district court's decision on a motion to compel arbitration *de novo*, *Reeves v. Enter. Prod. Partners, L.P.*, 17 F.4th 1008, 1011 (10th Cir. 2021), and reviews the factual findings underlying that decision for clear error, *Beltran v. AuPairCare, Inc.*, 907 F.3d 1240, 1252 (10th Cir. 2018).

Although Defendants emphasize (at 25) a "liberal federal policy favoring arbitration agreements" and urge the Court to apply a presumption in favor of arbitration, this Court has confirmed that any "presumption" in favor of arbitration "disappears" when, as here, "the parties dispute the existence of a valid arbitration agreement." *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1220 (10th Cir. 2002). Then, a court may compel arbitration only if "there are no genuine issues of material fact regarding the parties' agreement," giving the party opposing arbitration "the benefit of all reasonable doubts and inferences that may arise." *Hancock v. Am. Tel. & Tel. Co., Inc.*, 701 F.3d 1248, 1261 (10th Cir. 2012) (citations omitted).

II. The district court correctly decided Ms. Parisi's challenges to the existence of the arbitration agreements, rather than delegating them to an arbitrator.

Defendants contend that, because the arbitration provisions at issue contain delegation clauses, the district court should not have decided Ms. Parisi's challenges and should have instead sent them to arbitration.[6] But it is black-letter law that, before a court can enforce an arbitration agreement, it must determine that the parties agreed to arbitrate the dispute. The Federal Arbitration Act (FAA) provides that a federal court can compel arbitration only "upon being satisfied that the making of the agreement for arbitration . . . is not in issue." 9 U.S.C. § 4. The Supreme Court has interpreted that language to mean that "the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010). That principle applies even if the arbitration agreement contains a delegation clause: "The issue of whether an arbitration agreement was

[6] While RBA sought to enforce its purported delegation clause before the district court (App. Vol. 3 at 533-35), GreenSky did not seek to enforce any delegation clause (App. Vol. 1 at 016-40, 272-81). GreenSky briefly notes (at 67) that it "quoted" the "delegation provision" before the district court, but it did not explicitly invoke the purported delegation clause or ask the court to enforce it; instead, it merely quoted the full arbitration clause, which includes the language it now says delegates questions of arbitrability, App. Vol. 1 at 025. As such, GreenSky has waived any contractual right to enforce a delegation clause. *See In re Checking Acct. Overdraft Litig.*, 754 F.3d 1290, 1298 (11th Cir. 2014) (holding that party waived delegation clause by failing to raise it in motion to compel).

formed between the parties must always be decided by a court, regardless of whether the alleged agreement contained a delegation clause or whether one of the parties specifically challenged such a clause." *Fedor v. United Healthcare, Inc.*, 976 F.3d 1100, 1105 (10th Cir. 2020); *see also Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019) (similar). To compel arbitration without first determining whether the parties agreed to do so would undermine the bedrock principle that "arbitration is a matter of consent, not coercion." *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (cleaned up).

Defendants try to avoid this core principle of arbitration law by reframing Ms. Parisi's arguments as contesting the "validity" or "enforceability" of the agreements, rather than whether they were formed. *See, e.g.*, Opening Brief 29-30, 31, 56-57. Then, they claim that, under the so-called "severability principle"—which requires courts to "treat a challenge to the validity of an arbitration agreement (or a delegation clause) separately from a challenge to the validity of the entire contract in which it appears," *New Prime Inc. v. Oliveira*, 586 U.S. 105, 112 (2019)—Ms. Parisi's challenges go to the validity of each contract as a whole, rather than the arbitration or delegation clauses specifically, and thus must be decided by an arbitrator. Opening Br. 29-30, 64-67 (citing, *inter alia*, *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010)).

That's wrong for two reasons. First, as RBA recognizes, there is an "exception" to the severability principle when a party disputes whether an "*arbitration agreement was ever concluded*." Opening Br. 31 n.4 (citing *Fedor*, 976 F.3d at 1106); *see Rent-A-Center*, 561 U.S. at 70 n.2 (explaining that severability principle's requirement that party specifically challenge arbitration provision or delegation clause applies to "[t]he issue of the agreement's validity," not "whether any agreement between the parties 'was ever concluded'" (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006))); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1140 (9th Cir. 1991) (noting that severability principle does not extend "to challenges going to the very existence of a contract that a party claims never to have agreed to"). In other words, "whether the parties agreed to send the given dispute to arbitration . . . must be answered by a court." *Suski*, 144 S. Ct. at 1193.

Here, Ms. Parisi's challenges clearly go to whether an arbitration agreement "was ever concluded." As to RBA, Ms. Parisi argued that she never formed the arbitration agreement because the contract to purchase windows from RBA lacked both elements of contract formation: mutual assent (encompassing notice, an agreement on the same material terms, lack of fraud in the execution, [7] and a valid

[7] Contrary to RBA's argument that Ms. Parisi brings a "fraudulent inducement" challenge that goes to enforceability, *see* Opening Br. 29-30, 56 n.9,

signature) and consideration. *See infra* Part III. As to Greensky, Ms. Parisi similarly argued that there was no notice of or mutual assent to the arbitration provision in the Loan Agreement. *See infra* Part IV.[8] Thus, despite Defendants' mislabeling of her claims as ones of "validity" or "enforceability," formation is exactly what Ms. Parisi argues: that "there was 'no meeting of the minds' and, thus, 'no contract.'" Opening Br. 31 (quoting App. Vol. 3 at 611).

Second, even if Ms. Parisi's arguments go to the "validity" rather than the making of the arbitration agreements—which they don't—she has satisfied the severability principle by "direct[ing]" her arguments "specifically to" the arbitration and delegation clauses. *See Rent-A-Center*, 561 U.S. at 71. For example, Ms. Parisi

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she actually argues *fraud in the execution*, which raises a question of contract formation, *see* Part III(A)(3).

[8] Citing examples of courts compelling arbitration in cases involving "unauthorized transactions," GreenSky argues (at 56) that the district court should have delegated to the arbitrator Ms. Parisi's argument that she did not agree to arbitrate because RBA was not authorized to accept the Loan Agreement on her behalf. But those cases involved claims on *the merits* about unauthorized transactions, not—as here—arguments that an arbitration agreement was never concluded because the person who accepted it was unauthorized to do so. *See Reznik v. Coinbase, Inc.*, 2024 WL 1055002, at *4 (S.D.N.Y. Mar. 11, 2024) (holding that lawsuit for damages based on defendant's failure to stop an unauthorized transaction was within scope of arbitration agreement); *Bach v. Andersons, Inc.*, 2023 WL 3564950, at *4 (E.D. Ky. May 8, 2023) (holding that claim for "unauthorized transactions in furtherance of fraud" fell within scope of arbitration agreement). Nothing could be more fundamental to the making of a contract than whether an offer was accepted in the first place. As such, deciding whether Ms. Parisi authorized the Shopping Pass transaction that GreenSky contends accepted the arbitration agreement is a question for the court.

disputed, among other things, having "ever validly assented to the terms" of the Windows Contract, "let alone to the arbitration provision included it," App. Vol. 3 at 615; *see also id.* at 596, or that she "agree[d] to the Loan Agreement containing the arbitration clause" because she did not have "reasonable notice of [or] assent to loan terms that include arbitration," App. Vol. 1 at 144-45. That satisfies the severability principle, even though those challenges apply to both the arbitration and delegation clauses and the larger contracts in which they are found. As the Supreme Court recently explained in *Suski*, "where a challenge applies 'equally' to the whole contract and to an arbitration or delegation provision, a court must address that challenge." 144 S. Ct. at 1194 (quoting *Rent-A-Center*, 561 U.S. at 71). That is because "[a]rbitration and delegation agreements are simply contracts, and, normally, if a party says that a contract is invalid, the court must address that argument before deciding the merits of the contract dispute." *Id.*

Consistent with that rule, in *Spahr v. Secco*, 330 F.3d 1266, 1271-72 (10th Cir. 2003), this Court rejected an argument—similar to the one Defendants make here—that an arbitrator should decide a challenge to the existence of the contract on the basis that one party "lacked the mental capacity to enter into a contract" because that argument applied to the contract "generally[] rather than the arbitration provision in particular." As *Spahr* explained, a challenge that goes "to *both* the entire

contract and the specific agreement to arbitrate in the contract" must be decided by a court. *Id.* at 1273.

This Court's later discussion in *In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litigation*, 835 F.3d 1195 (10th Cir. 2016), of whether a challenge based on lack of consideration for the entire contract constitutes a specific challenge to the arbitration provision cannot be squared with the Supreme Court's recent decision in *Suski*, and thus is no longer good law. In that case, the plaintiffs argued that Cox's ability to unilaterally change the contract terms, including the arbitration clause, made its promise to arbitrate illusory and rendered the arbitration clause unenforceable. *Id.* at 1209. Assuming that lack of consideration went to enforceability,[9] this Court concluded that the illusoriness challenge was not specific to the arbitration provision. 835 F.3d at 1209. It reasoned that, to invalidate the arbitration provision, the plaintiffs had to "show that nowhere in the service agreement has Cox provided consideration, and that showing goes to the enforceability of the contract as a whole." *Id.* In other words, the Court concluded there was not a specific challenge because the illusoriness argument did not apply "just" to the arbitration provision, *see id.* at 1211, even if establishing that the whole contract was invalid because *no* provision provided consideration would mean that

[9] *But see supra* Part III(B) (discussing consideration as formation requirement under Oklahoma law).

the arbitration provision was invalid and lacked consideration too. But, as *Suski* clarified, just because a challenge applies equally to the whole agreement does not mean that it cannot also be specific to the arbitration clause. *See* 144 S. Ct. at 1194.

So, to the extent it applies, the specific-challenge requirement is satisfied here: Ms. Parisi's argument is that, because neither the Windows Contract nor the Loan Agreement was formed, the arbitration and delegation clauses within those contracts were not formed either. That's similar to the argument that satisfied the severability principle in *Suski*: that no arbitration agreement existed because it had been superseded by a later contract and that, therefore, the delegation clause within that arbitration agreement did not exist either. 144 S. Ct. at 1194 n.*. As such, it was proper for the district court to address Ms. Parisi's formation challenges.

III. The district court correctly denied RBA's motion to compel arbitration because RBA did not meet its burden of proving the existence of an arbitration agreement.

As the district court correctly recognized, the burden is on RBA to establish the existence of a binding agreement to arbitrate. App. Vol. 3 at 691 (citing *Bellman v. i3 Carbon, LLC*, 563 F. App'x 608, 612 (10th Cir. 2014)); *see also Hancock*, 701 F.3d at 1261-60. And as the district court correctly concluded, RBA has failed to do so. App. Vol. 3 at 694.

RBA argues that the mere fact that Ms. Parisi electronically "signed the Windows Contract . . . is more than sufficient evidence to conclude the existence of

an arbitration agreement." Opening Br. 34. Indeed, the only evidence RBA submitted below to prove the parties formed a contract was the signed Windows Contract itself. *See* App. Vol. 3 at 694 (RBA "merely present[ed] the Contract and state[d] conclusively that the agreement is enforceable because Parisi signed it"); *see also id.* at 549, ¶ 2; *id.* at 553-82. But contract formation requires more than a signature. Under Oklahoma law,[10] RBA must establish that there was "mutual assent to the essential terms of the agreement," *Hancock*, 701 F.3d at 1256, and that the agreement was supported by valid consideration, Okla. Stat. tit. 15, § 2. RBA has established neither of those elements. The district court therefore correctly held that without mutual assent or consideration, there was no agreement and arbitration could not be compelled. App. Vol. 3 at 691, 694.

A. The district court correctly held that the Windows Contract lacked mutual assent.

1. Ms. Parisi did not have reasonable notice of the terms offered to her.

Because, "an offeree cannot actually assent to an offer unless the offeree knows of its existence," 1 Williston on Contracts § 4:16, there can be mutual assent here only if Ms. Parisi was given "reasonable notice" of the contract terms being

[10] The parties agree that courts "apply ordinary state-law principles that govern the formation of contracts" to determine whether the parties agreed to arbitrate a dispute, *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 475 (10th Cir. 2006), and that here, Oklahoma law applies.

offered and the manner in which to assent to the offer, *Hancock*, 701 F.3d at 1256; *see also Walker v. BuildDirect.Com Techs., Inc.*, 349 P.3d 549, 553 (Okla. 2015) (evaluating "whether the party to be bound had reasonable notice of and assented to the terms" available on manufacturer's website). Reasonable notice means that the consumer at a minimum "had the opportunity to read and obtain actual knowledge" of the contract terms. *Williams v. TAMKO Bldg. Prods., Inc.*, 451 P.3d 146, 151 (Okla. 2019).

This fundamental rule applies with just as much force to contracts purportedly formed electronically. In fact, "the electronic age has not made the formalities of contract less crucial, but more so." *Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC*, 993 F.3d 253, 260 (4th Cir. 2021). While a party who receives a physical document containing contract terms is usually presumed to have notice of those terms because they can thumb through the document, consumers often do not have the same opportunity when contracting online. *See Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 31 (2d Cir. 2002) (Sotomayor, J.). The "onus" is therefore on a company doing business electronically to "put users on notice of the terms to which they wish to bind consumers." *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1179 (9th Cir. 2014).

So, to provide reasonable notice of and obtain mutual assent to a contract proposed in an electronic format, a company must design its interface in a way that

the offered terms, including any arbitration clause, are "clearly presented" or "reasonably conspicuous." *See Hancock*, 701 F.3d at 1256-57 (quotation omitted); *see also, e.g.*, *Eakins v. Whaleco Inc.*, – F.Supp.3d –, 2024 WL 1190766, at *1, *3 (W.D. Okla. Mar. 5, 2024), *appeal docketed* (considering "the design and content of the relevant interface" to conclude that defendant's "online marketplace" "failed to provide reasonably conspicuous notice that [p]laintiff was agreeing to [its] terms of use").

Consider *Hancock*, in which this Court held that there was reasonable notice because AT&T technicians would present customers with a hard copy of terms of service that they could read before using the technician's device to click an "I Acknowledge" button, which specifically referenced those terms. 701 F.3d at 1257-58. The Court contrasted that notice with the insufficient notice in *Specht*, where consumers who downloaded a software plug-in had "no visible notice of accompanying terms," including an arbitration provision, because the website's "layout concealed the license terms in a 'submerged screen.'" *Id.* at 1257 (citing and quoting *Specht*, 306 F.3d at 32-34). In other words, in *Hancock*, there was notice because the technicians brought the terms to consumers' attention and consumers could read them, unlike in *Specht*, where there was no notice because the terms were not even visible. *See also, e.g.*, *Krafczek v. Cablevision Sys. Corp.*, 2018 WL 8918077, at *3-4 (E.D.N.Y. Apr. 25, 2018) (finding adequate notice where

consumers could scroll through "complete text" of terms on field technicians' iPads before clicking button agreeing to those terms and signing separate acknowledgment).

Notice falls short not only when the terms are not visible but also when the interface design and greater context would lead a reasonable consumer to believe they're assenting to something different than the actual terms of the offer. For example, in *Sgouros v. TransUnion Corp.*, 817 F.3d 1029 (7th Cir. 2016), the Seventh Circuit found that no agreement was formed because "TransUnion's site actively misleads the customer" into believing "that clicking on the box constituted his authorization for TransUnion to obtain his personal information," and not his agreement to other contract terms, including the arbitration agreement TransUnion sought to enforce. *Id.* at 1035-36; *see id.* at 1025 ("[W]here a website specifically states that clicking means one thing, that click does not bind users to something else."); *see also, e.g.*, *Lee v. Intelius Inc.*, 737 F.3d 1254, 1259 (9th Cir. 2013) (holding that parties did not form arbitration agreement where plaintiff reasonably believed he was purchasing only a background check and report, and not also a monthly "family safety report" from the party seeking to compel arbitration); *Treinish v. iFit Inc.*, 2023 WL 2230431, at *4 (C.D. Cal. Feb. 2, 2023) (holding that a consumer who applied for financing to pay for a treadmill did not agree to arbitrate claims related to the use of that treadmill when clicking "Apply Now" because he

reasonably believed he "was signing up to merely *apply* for the service, not to guarantee access to the service itself").[11]

And while RBA recites (at 33-35) the general proposition that a party who signs a contract is presumed to have read its terms, that principle does not apply where the party has a "valid excuse" for their "ignorance" of the contract terms. *First Nat'l Bank & Trust Co. of El Reno v. Stinchcomb*, 734 P.2d 852, 854 (Okla. 1987). One such excuse is a lack of reasonable notice: "A person can assent to terms even if he or she does not actually read them, but the offer must nonetheless make clear to a reasonable consumer both that terms are being presented and that they can be adopted through the conduct that the offeror alleges constituted assent." *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 123 (2d Cir. 2012) (cleaned up).[12]

Under these basic tenets of contract law, RBA did not place Ms. Parisi on reasonable notice of the Windows Contract's terms, including the arbitration provision and delegation clause it now seeks to enforce, or that, by signing on the

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[11] The *Treinish* court did, by contrast, conclude that the consumer had notice of the terms of a membership agreement associated with the treadmill because, once his financing was approved, he purchased the treadmill and signed up for a membership, which required confirming that he had read and agreed to the membership agreement's terms, including its arbitration agreement. *Id.* at *2, *4.

[12] Another excuse is fraud. *See Stinchcomb*, 734 P.2d at 854. Ms. Parisi has provided unrebutted testimony that the RBA representative misrepresented the nature of what she was agreeing to on his iPad, supporting a claim for fraud in the execution. *See infra* Part III(A)(3).

iPad, she was assenting to anything other a credit check and loan application.[13] The relevant facts are undisputed. For one, although a company's digital interface must present the offered contract terms in a clear and conspicuous way, Ms. Parisi "was not able to see what [she] was signing" on the RBA salesperson's iPad. App. Vol. 3 at 625, ¶ 17.[14] Unlike *Krafczek*, where consumers were required to scroll through terms on an iPad in order to assent, 2018 WL 8918077, at *3, RBA's terms, including its arbitration clause, weren't on the screen at all. Instead, the "only thing visible on the iPad screen" was either the signature line or check box next to a signature line, App. Vol. 3 at 625, ¶ 17. That undisputed fact means there was no reasonable notice as a matter of law. *See, e.g.*, *Nat'l Fed'n of the Blind v. The Container Store, Inc.*, 904 F.3d 70, 83-84 (1st Cir. 2018) (holding that arbitration agreement was not formed where it was "undisputed" that visually impaired customers "had no way of

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[13] The district court did not separately address the notice component of assent in holding that RBA's arbitration clause lacks mutual assent. Even so, Ms. Parisi repeatedly argued below that she lacked reasonable notice. App. Vol. 3 608-10. For example, she argued that she lacked knowledge of the "terms offered," *id.* at 609, and did not know that "she was being obligated to a contract that included an arbitration clause," *id.* at 610. Addressing whether Ms. Parisi had reasonable notice is also necessary to respond to RBA's argument on appeal that Ms. Parisi's electronic signature alone was sufficient to form an agreement.

[14] Although it did not dispute Ms. Parisi's testimony below, RBA now asserts (at 35) that Ms. Parisi "had the opportunity to read the Windows Contract on the iPad[.]" RBA has not supported this assertion with any record evidence.

accessing the terms" because they could not see them on a store touch screen and because "no store clerk actually informed them" of the terms).

Moreover, unlike in *Hancock*, Ms. Parisi was not given a hard copy of any contract terms, including the arbitration clause, to review before signing. App. Vol. 3 at 625, ¶ 19. And, as in *National Federation of the Blind*, although the terms were not visible on the iPad screen, the salesperson did not explain them or advise that they included an arbitration clause. *Id.* ¶ 20. In fact, he did the opposite, leading Ms. Parisi to believe that, by signing the iPad, she was agreeing to something else entirely: a "credit check and the loan application" with GreenSky. *Id.* at 624-25, ¶¶ 8, 10, 13, 16; *see also supra* pp. 6-7.

Given this context, a reasonable consumer would believe, as Ms. Parisi did, that she was only authorizing GreenSky to obtain her credit information and process a loan application, not that she was binding herself to purchase windows from RBA before hearing whether she qualified for the loan necessary to obtain those windows. *See id.* at 624-25, ¶¶13, 21; *id.* at 686-87. In fact, even after the GreenSky and RBA representatives informed Ms. Parisi that she'd "been approved for the 2-year loan program with GreenSky," *id.* at 626, ¶ 26—which, of course, turned out to not be the zero-interest loan Ms. Parisi had intended to apply for—Ms. Parisi still didn't see any contract terms, wasn't given an opportunity to review what she'd already been directed to sign, wasn't directed to sign additional documents to finalize a

purchase contract, and wasn't told that her signatures would be applied to a contract to purchase windows or arbitrate claims related to such purchase, *id* ¶ 28. So while RBA makes much of language in Ms. Parisi's complaint that she "agreed to purchase" the windows after she was told she had been approved for the loan, Opening Br. 35 (quoting App. Vol. 1 at 117, ¶ 67), and that she signed the iPad 12 times, *id.* at 35-36, that does not change the fact that, when she signed, she lacked notice that her signatures would be construed as manifesting her assent to a contract to purchase windows or to arbitrate claims related to the windows purchase.[15]

RBA emphasizes (at 35) two unpublished district court cases in which courts concluded that the parties formed agreements to arbitrate in similar settings in which the consumer met with a company representative in person and signed the purported contract using an iPad. *See Lojewski v. Group Solar USA, LLC*, 2023 WL 5301423 (S.D.N.Y. Aug. 17, 2023); *Bayron-Paz v. Wells Fargo Bank, N.A.*, 2023 WL 4399041 (S.D.N.Y. July 7, 2023). But notice was not a problem in those cases as it is here. In *Lojewski*, the consumer could have "reviewed the Agreement" but did not. 2023 WL 5301423, at *10. Moreover, unlike here, there was no evidence she had been "defrauded, or otherwise misled . . . into signing" so she could have "directly

[15] RBA also notes (at 34) that Ms. Parisi was emailed a copy of the Windows Contract. But the fact that RBA sent Ms. Parisi the terms of the Windows Contract *later* does not change the fact that she did not have reasonable notice of the terms at the time RBA says she assented to them.

engage[d]" with the salesperson to "ask about the Agreement" but did not. *Id.* at *9-10. Similarly, in *Bayron-Paz*, the plaintiff had adequate notice of the terms after signing the agreement on an iPad because, even though he couldn't see the terms, he "knew" what the transaction was for—the "purchase of the car and the financing of the purchase"—and "chose to sign the iPad twice without requesting that its contents be displayed to him." 2023 WL 4399041, at *4. Here, Ms. Parisi did not know that the contract was to purchase windows or arbitrate her claims.

In sum, RBA has not shown that Ms. Parisi had reasonable notice of the Window Contract's terms, including its arbitration clause, and thus has failed to meet its burden of showing that the parties mutually assented to arbitration.

2. The parties did not agree on an essential term of the Windows Contract.

Even if RBA had provided reasonable notice of the initial contract terms it was offering and Ms. Parisi was accepting by signing the iPad (which it did not), that contract was materially different than the contract that RBA now seeks to enforce because it was financed by a zero-interest loan rather than a high-interest loan. In addition to notice, mutual assent requires that "the parties all agree upon the same thing in the same sense," *In re De-Annexation of Certain Real Prop. from Seminole*, 204 P.3d 87, 89 (Okla. 2009) (quoting Okla. Stat. tit. 15, § 66). That is, to form a contract, the acceptance must be "identical to the offer." *Ollie v. Rainbolt*, 669 P.2d 275, 280 (Okla. 1983). Under that standard, RBA has failed to prove there

was mutual assent because the parties did not agree on the same essential terms at the same time.

As the district court found, the parties did not agree on zero-interest financing, an "essential element" of the purported agreement. App. Vol. 3 at 692. Based on the lack of agreement on that term, the district court correctly held that the parties did not form the Windows Contract, and thus necessarily did not form an arbitration clause within that contract. *Id.* at 694. In particular, RBA purported to offer Ms. Parisi an agreement specifying that her purchase would be financed by a zero-interest loan, and that is the agreement Ms. Parisi reasonably understood she was assenting to (to the extent she can be construed as having reasonable notice of the Window Contract's terms at all, *see supra* Part III(A)(1)). App. Vol. 3 at 692-93. But the agreement that RBA now claims to have formed and that it seeks to enforce is for the purchase of windows financed by a high-interest loan. *Id.* at 693. Thus, the parties did not agree on an essential term of the contract, and Ms. Parisi's "alleged acceptance" of RBA's "invalid offer" of "something it could not deliver" had "no legal import." *Id.*

Faced with the simple facts that Ms. Parisi lacked notice of and did not agree to the essentials terms of the contract RBA seeks to enforce, RBA raises several unpersuasive arguments.

First, it counters that the district court's analysis strayed beyond the four corners of the agreement, which it says demonstrates that zero-interest financing was not an essential term in the Windows Contract. *See* Opening Br. 37-41, 47. In support of that interpretation, RBA points to one of the "Terms and Conditions of Sale," which contemplates delay due to the buyer's "inability to qualify for or obtain financing." *Id.* at 40 (quoting App. Vol. 3 at 560). It also notes that the contract refers to financing using a conditional "if" and provides three days to cancel after the date of the contract, not after financing is approved, thus making the Windows Contract not dependent on Ms. Parisi's ability to obtain financing. *Id.* at 41.

But the district court did not need to look beyond the Windows Contract itself to conclude that zero-interest financing was an essential element; it properly construed the contract "as a whole" when determining the parties' intent at the time the contract was made. *See Patel v. Tulsa Pain Consultants, Inc.*, 511 P.3d 1059, 1062 (Okla. 2022). The purported contract between Ms. Parisi and RBA consists of the "documents listed in the Table of Contents" of the thirty-page document RBA emailed Ms. Parisi, including, as relevant here, the Agreement Document and Payment Terms and the GreenSky Financing Form. App. Vol. 3 at 553-54.

Both documents expressly refer to the terms of Ms. Parisi's financing. The Agreement Document and Payment Terms specifies that Ms. Parisi's "Method of Payment" will be "Financing." *Id.* at 554. A few pages later, the GreenSky Financing

Form specifies Ms. Parisi's particular financing "plan": "24 month promotional period. Interest waived if balance paid off before promotional period ends." *Id.* at 557. In other words, although the specific terms RBA relies on could be interpreted to leave open questions of financing, those questions were unambiguously answered by the contract's incorporation of a term stating that the windows purchase would be financed through a two-year, zero-interest loan. RBA's interpretation of the Windows Contract would mean that term has "no effect," violating the rule that a court should give effect to each contractual provision. *See Patel*, 511 P.3d at 1062 (citation omitted).

At the very least, the Windows Contract is ambiguous about whether zero-interest financing is an essential element. When a contract is ambiguous, it "may be explained by reference to the circumstances under which it was made, and the matter to which it relates." *Scungio v. Scungio*, 291 P.3d 616, 622-23 (Okla. 2012) (quoting Okla. Stat. tit. 15, § 163) (relying on the "facts and circumstances surrounding the execution of the Agreement" to "clear[]" contractual ambiguity).

Taking into account the circumstances of the purported transaction between Ms. Parisi and the RBA salesperson, there's nothing ambiguous about it: zero-interest financing was an essential term. Ms. Parisi was clear from the start that, because she would be starting chemotherapy soon, she could afford to upgrade her windows only with the advertised zero-interest financing. App. Vol. 3 at 624, ¶ 6. In

response, the RBA salesperson confirmed she could be eligible for that type of loan and started the process for her to apply. *Id.* ¶¶ 7-8, 10. It was only then that she agreed to submit an application: "to secure the zero interest for two years and two payments loan program." *Id.* at 625, ¶ 10, 16 (cleaned up). In short, Ms. Parisi was transparent, and the RBA salesperson was aware, that having two years of no payments or interest was essential to her agreeing to upgrade her windows and, assuming she had notice (which she did not), agreeing to any other contract terms, including giving up her right of access to court. Or, as the district court aptly put it, "the Zero-Interest Loan was the foundation of the entire transaction." *Id.* at 692.

Second, implicitly acknowledging that zero-interest financing was an essential term of the Windows Contract, RBA suggests (at 41-42) that Ms. Parisi's recourse is instead to seek to enforce that term or rescind the contract. This argument puts the cart before the horse, however, as those remedies are available only where there *is* a contract to enforce. Here, as described above, no agreement to purchase windows with zero-interest financing was formed: Ms. Parisi lacked notice of the material terms of the agreement and, even if she had notice, the terms she accepted were not the terms RBA had authority to offer. App. Vol. 3 at 692-94. Thus, there is nothing for Ms. Parisi to enforce or rescind.

Third, RBA cites cases involving what it terms "structurally similar transaction[s]" to convince this Court that Ms. Parisi's challenges do not negate the

formation of the overall agreement to purchase windows. *See* Opening Br. 43-44. But those cases concern whether claims fall within the scope of an arbitration agreement, and thus have no relevance to Ms. Parisi's argument that no arbitration agreement was formed in the first place. *See Mooneyham v. BRSI, LLC*, 682 F. App'x 655, 659 (10th Cir. 2017) (addressing "the scope of [arbitration] agreement, not its existence"); *Hometown Home Health Inc. v. MISYS Healthcare Sys. LLC*, 2008 WL 11419002, at *1, *3 (W.D. Okla. Oct. 29, 2008) (holding that plaintiff's contract and fraud claims related to a purchase contract and a separate financing agreement fell within scope of the purchase contract's arbitration clause).

3. Ms. Parisi did not assent to the Windows Contract and its arbitration clause because of fraud in the execution.

This Court can affirm the district court on the alternative ground that the parties did not form either the Windows Contract or the arbitration provision and delegation clause within it because of fraud in the execution.[16] That occurs when one party has been misled by the other party about the "very nature" or essential terms

[16] This Court may affirm the district court's decision on an alternative basis supported by the record, particularly where, as here, Defendants have a "fair chance to respond" and there are no disputes of material fact because, again, RBA failed to dispute Ms. Parisi's testimony about her interactions with the RBA salesperson. *See Davidson Oil Co. v. City of Albuquerque*, – F.4th –, 2024 WL 3465112, at *2 (10th Cir. July 19, 2024) (citations omitted); *AWF Hedged, Ltd. v. Kidder, Peabody & Co., Inc.*, 1994 WL 446782, at *1 (10th Cir. Aug. 18, 1994) (affirming district court's determination of arbitrability and summary denial of motion to compel arbitration on "alternative basis . . . supported by the record").

of what they are signing, including that they're "assenting to a contract entirely different from the proposed contract." Restatement (Second) of Contracts § 163, cmt. a. The misrepresentation must be knowing, material, and lead the other party to appear to manifest their assent. *Id.* § 163 There is "no manifestation of assent" or meeting of the minds, and thus "no contract at all," under such circumstances. *Id.* § 163, cmt. a; *see also Harkrider v. Posey*, 24 P.3d 821, 826-27 (Okla. 2000).

Telling a consumer her signature is needed for one purpose and then claiming that signature is evidence of an agreement for something else is a quintessential form of fraud in the execution. Take *Droney v. Vivint Solar*, No. 18-849, 2018 WL 6191887 (D.N.J. Nov. 28, 2018), in which a consumer was told she was signing a salesperson's blank iPad screen merely to confirm that she owned her home and to allow him to evaluate whether she qualified for free solar panels. *Id.* at *1. In reality, the salesperson used her signature for something "radically different": an agreement to buy energy from the solar company for 20 years and to arbitrate claims related to that arrangement. *Id.* at *4. As the court explained, "[t]his stark difference in what [the plaintiff] believed she agreed to and [the solar agreement] at issue is fraud in the execution." *Id.* In addition to the plaintiff's affidavit, the district court also relied on "numerous civilian complaints . . . that appear to show a pattern of fraudulent conduct on behalf of [the defendant solar company]." *Id.* at *7. Based on this evidence from the consumer, and the lack of evidence from the company, the district

court found a genuine issue of fact as to whether an agreement to arbitrate existed and denied the motion to compel arbitration. *Id.*

As another example, consider *Sheppard v. Bourgeois*, 2001 WL 37125392 (D.N.M. Aug. 31, 2001), in which the plaintiff was told she could sign up for a dentist's in-house "monthly credit plan," which would allow her to avoid making interest payments if she paid off a debt for emergency dental work in a year. *Id.* at *2. Although the plaintiff signed only what she was told was a form "to run a credit check," the form was actually an "application for a credit card account" with a third party, which opened a credit card account in the plaintiff's name. *Id.* The district court denied the third party's effort to enforce the arbitration agreement contained within the signed form based on the plaintiff's allegations of fraud in the execution. *Id.* at *5-6. Rejecting the third party's reliance on the general duty to read—also erroneously relied on by RBA, *see supra* Part III(A)(2)—the *Sheppard* court explained that "there is no agreement at all and no terms for [a party] to be presumed to know" when she "has been deceived as to the nature of the agreement that she signed." 2001 WL 37125392, at *5.

Consistent with a documented pattern of GreenSky enabling its merchants to engage in misleading business practices, RBA's salesperson misrepresented the nature of what he directed Ms. Parisi to sign. The district court did not clearly err in crediting Ms. Parisi's undisputed testimony that the RBA representative "did not

inform Parisi her signature could be used for purposes other than the credit check and loan application." App. Vol. 3 at 686 (citing *id.* at 624, ¶ 13). Indeed, as the district court noted, Ms. "Parisi was unaware she was purportedly signing a contract at all; she only ever intended to apply for the Zero-Interest Loan by signing the iPad." *Id.* at 687 (citing *id.* at 625, ¶ 21).

Moreover, as in *Droney*, Ms. Parisi's experience accords with findings contained within the CFPB's consent order that GreenSky enabled merchants like RBA to take out fraudulent loans on behalf of thousands of consumers who did not request or authorize them. *See generally* App. Vol. 1 at 198-254. As the CFPB found, the GreenSky Program allowed merchants to bypass consumers and receive the proceeds of fraudulently obtained loans directly. *Id.* at 205-10, ¶¶ 9-32. And although the CFPB required GreenSky to take steps to prevent future abuses by merchants such as RBA, *id.* at 217-26, Ms. Parisi's experience of the GreenSky Program, and RBA's role in it, shows that these abuses continue.

For this reason too, the Court can and should affirm the district court's conclusion that the Windows Contract and its arbitration clause lack mutual assent.

4. Ms. Parisi did not assent to the Windows Contract and its arbitration clause because RBA failed to comply with federal and state electronic signature laws.

Finally, this Court can also affirm on the ground that there was no mutual assent because RBA failed to comply with laws regarding electronic signatures.[17]

Both the federal Electronic Signatures in Global and National Commerce Act (E-Sign Act) and the Oklahoma Uniform Electronic Transactions Act (OUETA) set forth statutory requirements for a consumer's electronic signature to serve as consent to an agreement. Under the E-Sign Act, a consumer must affirmatively consent to the use of their electronic signature, 15 U.S.C. § 7001(c)(1)(A), and before that, must receive clear and conspicuous notice of, *inter alia*, their right to have the signed record provided in a non-electronic form and the transactions to which the electronic signature will apply, *id.* § 7001(c)(1)(B). Similarly, under the OUETA, an electronic signature is consent "only between parties each of which has agreed to conduct transactions by electronic means," which is determined based on the context and surrounding circumstances of the transaction. Okla. Stat., tit. 12A § 15-105(b). Like the E-Sign Act, the OUETA clarifies that a consumer's agreement to conduct one transaction electronically does not automatically apply to other transactions. *Id.* § 15-105(c). And both federal and state law require that there have been specific

[17] The district court acknowledged Ms. Parisi's arguments regarding electronic signature laws but declined to reach them when denying the motion to compel arbitration on other formation grounds. App. Vol. 3 at 691 n.7.

"intent to sign the record" at issue for an electronic signature to be valid consent. *See* 15 U.S.C. § 7006(5); Okla. Stat., tit. 12A § 15-102(10).

Courts across the country have treated these electronic signature requirements as raising fundamental questions of contract formation. For example, in *Ferguson v. GreenSky, Inc.*, 2023 WL 4462126 (9th Cir. July 11, 2023), the plaintiff argued that the "parties did not form a contract" or "agree to arbitration" in part because GreenSky failed to comply with California's Credit Services Act of 1984. *Id.* at *1. The Ninth Circuit agreed, explaining that the "signature and disclosure requirements" under state law "are 'contract formation requirements.'" *Id.* (quoting *Mitchell v. Am. Fair Credit Assoc., Inc.*, 99 Cal. App. 4th 1345, 1351 (Cal. Ct. App. 2002)). In support, the court also looked to the U.S. Supreme Court's instruction "that 'whether the alleged obligor ever signed the contract' is a question that pertains to contract formation." *Id.* (quoting *Buckeye*, 546 U.S. at 444 n.1).[18] Because "the agreement failed to satisfy the formation requirements in the Credit Services Act," the Ninth Circuit reversed the district court's order compelling arbitration. *Id.* at *2; *see also, e.g.*, *Malone v. Hoogland Foods, LLC*, 2020 WL 6158201, at *5-7 (W.D. Wis. Oct. 21, 2020) (characterizing question whether, under Wisconsin electronic

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[18] Consistent with the district court's decision to decide Ms. Parisi's formation challenges, *see supra* Part II, the Ninth Circuit in *Ferguson* rejected GreenSky's argument "that an arbitrator must resolve any formation challenge that Ferguson has raised" because "contract-*formation* issues are always matters for judicial resolution." 2023 WL 4462126, at *2 (cleaned up).

signature laws, employee "signed the arbitration agreement" despite "a reasonable misapprehension of the nature of the document" as one of "the formation of the arbitration agreement").

RBA failed to comply with the basic requirements under federal and state electronic laws and thus failed to obtain Ms. Parisi's consent in the form of a valid signature to either the Windows Contract or its arbitration provision and delegation clause. It is undisputed that Ms. Parisi was not provided with any disclosures about how her electronic signature would be used or that she could receive paper copies of what she was signing. App. Vol. 3 at 624, ¶¶ 11-12. Nor did she consent to her electronic signature being used for anything other than the purported credit check and loan application; indeed, she did not intend to sign anything else. *Id.* ¶¶ 10-13. This, too, is another basis on which to affirm the district court's conclusion that RBA's purported agreement to arbitrate lacks mutual assent.

B. RBA cannot show that the Windows Contract or its arbitration provision are supported by consideration.

The district court also correctly held, in the alternative, that the Windows Contract lacked consideration because it "is not mutually enforceable." App. Vol. 3 at 694.

"An essential element of a contract is sufficient consideration." *Thompson v. Bar-S Foods Co.*, 174 P.3d 567, 574 (Okla. 2007). In *Thompson*, the Oklahoma Supreme Court concluded that an arbitration provision in an employment contract

was not supported by consideration because the employee "was required to arbitrate her claim and to waive her right to a trial, in exchange for a promise from [her employer] that it could withdraw *without notice*." *Id.* In other words, the "promise [was] essentially empty or illusory" and thus "negate[d] the existence of consideration." *Id.* Here, if the Court accepts RBA's argument that the contract allowed it to change the essential financing term without notice and still enforce the contract against Ms. Parisi, that means RBA's promise was likewise "empty or illusory": RBA could change *any* of the terms of the contract (including the arbitration provision) at any time to get out of its obligations, while still holding Ms. Parisi to hers.

In response, RBA points to "several mutual promises between the parties," including their "mutual promise to arbitrate." Opening Br. 39. As this Court has explained, "binding, mutual promises . . . to arbitrate supply adequate consideration to support an arbitration agreement." *Williams-Jackson v. Innovative Senior Care Home Health of Edmond, LLC*, 727 F. App'x 965, 969 (10th Cir. 2018). That principle is true as far as it goes, but it doesn't apply if those promises are illusory. In *Williams-Jackson*, this Court distinguished *Thompson* as an example of when promises are *not* mutual, explaining that "unlike in *Thompson*," there was no evidence in *Williams-Jackson* that the defendants had reserved the right to unilaterally modify the agreement "at any time, without notice"—*i.e.*, there was no

evidence that the promise was empty or illusory. *Id.* By contrast, here, as in *Thompson*, RBA argues that it *was* permitted to modify the contract after Ms. Parisi signed it to change the essential financing term, rendering all its promises—including to arbitrate—illusory.

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Whether framed in terms of mutual assent or consideration, one thing is clear: Ms. Parisi cannot be bound to the Windows Contract or its arbitration clause, and the district court's decision denying RBA's motion to compel arbitration should be affirmed.

IV. The district court correctly denied GreenSky's motion to compel arbitration.

GreenSky seeks to compel arbitration based on the Loan Agreement between Ms. Parisi and BMO Harris Bank, which contains an arbitration clause. But, as a non-signatory, it cannot enforce any part of the Loan Agreement unless the Loan Agreement was formed in the first place. It was not. GreenSky has not met its burden of proving that Ms. Parisi had notice of the Loan Agreement, let alone of the arbitration or delegation clauses within it. And even if it could establish that she had notice, GreenSky has not met its burden to show that she engaged in the conduct necessary to accept it: initiating a Shopping Pass transaction herself or authorizing RBA to do so on her behalf. Thus, no Loan Agreement was formed, and GreenSky cannot compel arbitration based on the arbitration clause in the Loan Agreement.

A. GreenSky cannot enforce an agreement that was never formed.

GreenSky contends that the district court erred in focusing on the formation of the Loan Agreement as a whole when denying its motion to compel arbitration because, GreenSky argues, it is a "party" only to the Loan Agreement's arbitration clause. Opening Br. 53. Even if the Court accepts that argument—which it should not—that does not affect the outcome of this appeal because Ms. Parisi's formation arguments apply with equal force to the arbitration provision standing alone as they do to the entire agreement. *See supra* Part II. Moreover, it reflects a fundamental misunderstanding of contract law. There is no dispute that BMO Harris Bank, not GreenSky, signed the Loan Agreement—including the arbitration clause—as the "Lender." App. Vol. 1 at 70; *see* Opening Br. 51 (emphasizing that only BMO Harris Bank is the "Lender" under the Loan Agreement). Indeed, GreenSky itself acknowledges (at 52) that it "did not make any 'offer' to Parisi" that she could accept to form a contract. And it has pointed to no case in which a non-signatory was converted to a party only for purposes of one clause within a larger contract simply by being referenced in that clause.

Thus, GreenSky can seek to enforce the arbitration clause only under recognized theories of non-signatory enforcement, such as "third-party beneficiary theories, waiver and estoppel." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (citation omitted). For example, in the cases it cites (at 51-53, 52 n.8),

GreenSky and other non-signatories were allowed to enforce agreements under third-party beneficiary or equitable estoppel theories. *See, e.g.*, *Wright v. GreenSky, Inc.*, 2021 WL 2414170, at *12 (S.D. Fla. June 14, 2021) (third-party beneficiary doctrine); *High Sierra Energy, L.P. v. Hull*, 259 P.3d 902, 908 (Okla. Civ. App. 2011) (equitable estoppel); *B.A.P., L.L.P. v. Pearman*, 250 P.3d 332, 339-40 (Okla. Civ. App. 2011) (equitable estoppel-type doctrine).

GreenSky has not advanced any third-party enforcement theories in this appeal, instead insisting that it is a party to the Loan Agreement's arbitration clause (and no more). Thus, it has waived its right to do so, and that alone is grounds for affirmance. But even if it has preserved a non-signatory enforcement argument, it still must show that BMO Harris Bank and Ms. Parisi formed an agreement that it can enforce as a non-signatory. If no agreement was formed in the first place, GreenSky cannot enforce any part of it. *See Ferguson*, 2023 WL 4462126, at *1-2 (concluding that GreenSky could enforce arbitration clause in Loan Agreement only if requirements for formation of entire Loan Agreement were met, which they weren't). As explained below, the district court correctly concluded that no Loan Agreement—including its arbitration clause—was formed, so it did not need to decide whether GreenSky could enforce the arbitration clause as a non-signatory. *See Casa Arena Blanca LLC v. Rainwater ex rel. Estate of Green*, 2022 WL 839800, at *5 n.3 (10th Cir. 2022) ("[I]f the district court had determined that no agreement

to arbitrate had been formed between Ms. Burris and the Facility, then it would not have needed to go on to address whether the Arbitration Agreement could be enforced against Ms. Rainwater as a third-party beneficiary[.]").

B. Ms. Parisi never formed the arbitration agreement GreenSky seeks to enforce.

1. Ms. Parisi lacked notice of the terms of the Loan Agreement, including the arbitration provision.

As with the Windows Contract and its arbitration provision, Ms. Parisi lacked notice of the terms of the Loan Agreement, including its arbitration provision. As explained above, "an offeree cannot actually assent to an offer unless the offeree knows of its existence." 1 Williston on Contracts § 4:16; *see supra* Part III(A)(1). So, to form the Loan Agreement, Ms. Parisi needed notice "both that terms are being presented and that they can be adopted through the conduct that the offeror alleges constituted assent," here, using the Shopping Pass. *Schnabel*, 697 F.3d at 123. As the district court found, at the time the Shopping Pass was used, Ms. Parisi's unrefuted testimony established that she lacked *actual* notice of the Loan Agreement's terms or that use of the Shopping Pass would constitute her acceptance of them. App. Vol. 2 at 508-09. The emails regarding the loan went to her spam folder and she did not receive the mailed copy until after the Shopping Pass was used. *Id.* Nor did the emailed or mailed copies of the Loan Agreement put Ms. Parisi on "reasonable notice" of the arbitration agreement. *Hancock*, 701 F.3d at 1256.

First, regarding the mailed Loan Agreement, GreenSky spills considerable ink (at 60-62) emphasizing that proof of mailing creates a rebuttable presumption that a mailing was received. But Ms. Parisi has never disputed that she eventually received the Loan Agreement in the mail. Instead, she simply testified that she received it *after* the use of the Shopping Pass—her purported manifestation of assent—such that she did not have notice when the Loan Agreement was purportedly formed. *See* App. Vol. 3 at 628, ¶ 43.

GreenSky contends (at 61) that the district court should have disregarded Ms. Parisi's testimony about timing and instead employed a presumption that she received the mailed Loan Agreement within three days of when it was sent. To begin, because November 23 was the Tuesday before Thanksgiving, November 29—when the Shopping Pass transaction occurred—was only the third day from when the Loan Agreement was sent. *See* Fed. R. Civ. P. 6; *see also* App. Vol. 3 at 509 (district court noting holiday). Thus, even with the benefit of a presumption, GreenSky would at most be able to establish that Ms. Parisi received the agreement in the mail on the same day the Shopping Pass was used, and it has not established that she received the agreement *before* the Shopping Pass was used that morning. *See* App. Vol. 3 at 633.

That is, if there even is a three-day presumption as GreenSky contends. GreenSky cites (at 62) two out-of-circuit cases concerning the specific question of

when a right-to-sue notice from the EEOC is presumed to have been received. This case is not about receipt of an EEOC notice; it's about whether Ms. Parisi had reasonable notice of the terms of the contract that GreenSky seeks to enforce. And *this* Court has not confirmed whether there is a three- or five-day presumption even for EEOC notices. *See Lozano v. Ashcroft*, 258 F.3d 1160, 1164-65 (10th Cir. 2001). GreenSky thus fails to explain why a three-day presumption should apply here.

In any event, the cases GreenSky cites establish only a *rebuttable* presumption regarding when an EEOC notice was received. *See, e.g.*, *Payan v. Aramark Mgmt. Servs. Ltd. P'ship*, 495 F.3d 1119, 1124 (9th Cir. 2007) ("These assumptions may be rebutted with evidence to the contrary."); *see also Witt v. Roadway Express*, 136 F.3d 1424, 1430 (10th Cir. 1998) (holding that "it was error for the court to ignore Mr. Witt's affidavit" stating that he received EEOC notice later than the presumption); *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 526 (2d Cir. 1996) (similar). Here, Ms. Parisi rebutted any presumption by submitting a declaration stating that she did not receive the mailed Loan Agreement until after November 29. *See* App. Vol. 3 at 628, ¶ 43. Thus, the district court did not clearly err in finding that Ms. Parisi received the mailed copy of the Loan Agreement *after* the Shopping Pass was used and, thus, that Ms. Parisi did not have actual or reasonable notice of the terms of the agreement from the paper copy at the relevant time.

Second, as to the November 23, 2021 emails, GreenSky has not met its burden of showing that they provided Ms. Parisi with reasonable notice of the arbitration term in the Loan Agreement. *See* Opening Br. 58-60. GreenSky focuses solely on the fact that those emails arrived in Ms. Parisi's inbox on November 23 but says nothing of their contents, and that's where notice fell short. The first two emails were identical and stated in large letters at the top, "It's Time to Activate Your Loan!" and then that, if Ms. Parisi "wish[ed] to use [her] GreenSky loan to make a purchase with [her] merchant, as a next step you must activate your GreenSky account by completing the following steps." App. Vol. 3 at 641, 643. Those steps included "click[ing]" a button in the email, "enter[ing] the last four digits" of her social security number, "review[ing] and "sav[ing]" or "print[ing]" the Loan Agreement, and "follow[ing] the remaining prompts to complete the activation process." *Id.* Below that information was a small line of text providing a link that Ms. Parisi could click for "additional details about [her] loan," *Id.* at 642, 644, but GreenSky has provided no information on where this link would have led. Then, there was a graphic showing that Ms. Parisi was at step one ("Activate Your Account") of a six-step process for activating and using her loan. *Id.* Step 2 was "Register on the Customer Portal," and Step 3 was "Transact on Your Account." *Id.* There is no dispute that Ms. Parisi did not see this email or click on any of its buttons to "activate" her loan. *Id.* at 629, ¶ 51; App. Vol. 2 at 512; Opening Br. 59. Despite

that, a few minutes later, she received an email that said, "Congratulations on Activating Your Loan!" App. Vol. 3 at 645.[19] Further down, the email provided a link to "learn more about your loan," *id.*, but, again, GreenSky has provided no information about the website to which that link led. The email also informed Ms. Parisi she could "complete [her] registration" to "Review and save/print [her] loan documents." *Id.* Like the first two emails, the third email included a graphic of the steps in the loan process, but this time it showed her as being at step 2: "Register on the Customer Portal." *Id.* at 646.

Nothing in these emails indicated that Ms. Parisi was being offered a loan agreement that she could accept by using the Shopping Pass or by allowing RBA to use the Shopping Pass. *See Schnabel*, 697 F.3d at 123. Indeed, by directing her to "activate" her loan, and then congratulating her on doing so and instructing her to "register on the customer portal," the emails gave the erroneous impression that she had *already* completed the requirements for obtaining the loan. That impression was solidified by the fact that all three emails stated that Ms. Parisi could review, save, or print the loan agreement, not that she could accept or reject it. And most importantly, the emails never mentioned arbitration, let alone put her on notice that she was being offered an arbitration agreement. App. Vol. 3 at 641-45.

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[19] This presumably occurred because either the RBA or the GreenSky representative took the steps to "activate" her account.

Links buried in emails do not adequately notify consumers of arbitration provisions. *See, e.g.*, *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 293 (2d Cir. 2019) (finding no inquiry notice where "email in no way signal[ed] to [the consumer] that he should click on the link" to the terms and did "not advise him that he would be deemed to agree to the contract terms in the document to be found by clicking that link"); *Schnabel*, 697 F.3d at 123 (holding that email sent after consumer had enrolled in service that included an arbitration provision was insufficient to put consumer on inquiry notice of the provision and that, by continuing to use service, they were agreeing to terms); *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 557-58 (1st Cir. 2005) (holding that no arbitration agreement was formed because email containing a link to it did not "state directly that the Policy contained an arbitration agreement that was meant to effect a waiver of an employee's right to access a judicial forum" or "contain anything to put the recipient on inquiry notice of that possibility by conveying the Policy's contractual significance"); *Engen v. Grocery Delivery E-Servs. USA Inc.*, 453 F.Supp.3d 1231, 1240 (D. Minn. 2020) (holding that no arbitration agreement was formed because email with link to terms and conditions did not "call [consumer's] attention" to fact that arbitration provision had been added to the terms).

Indeed, in those cases, the email at least included either the terms themselves or a link directly to them. *See also Aldea-Tirado v. PricewaterhouseCoopers, LLP*,

101 F.4th 99, 108 (1st Cir. 2024) (finding inquiry notice where email "expressly stated both that it contained an arbitration agreement that effected waiver of the recipient-employee's rights to a judicial forum and that the recipient-employee's continued employment would constitute acceptance" of the agreement). Here, GreenSky has not even proved that much. It asserts (at 58) that it sent Ms. Parisi the Loan Agreement "by link within an email," but it does not identify which email or link it is referring to, and, on their face, none of the links from the emails in the record reference the Loan Agreement. *See also* App. Vol. 1 at 84, ¶ 23 (stating only that it sent the Loan Agreement "to Ms. Parisi in a link in which she could access it"). And it is not clear from GreenSky's ambiguous phrasing whether the link would take Ms. Parisi directly to the Loan Agreement or to a page where Ms. Parisi would have to register for an account and *then* navigate to the Loan Agreement to even read the terms and discover there was an arbitration provision that she could accept by using the Shopping Pass. *See* App. Vol. 3 at 645. That would not be sufficient to put her on reasonable notice of the arbitration provision. *See Nguyen*, 763 F.3d at 1179 ("[C]onsumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound.").

2. Ms. Parisi did not manifest her assent to the arbitration agreement.

Even assuming Ms. Parisi had notice of the terms of the Loan Agreement, including its arbitration clause (which she did not), she did not manifest her assent

to those terms. The Loan Agreement specifies the conduct the borrower must engage in to accept the agreement and the arbitration clause within it: "use of the Shopping Pass or the associated loan to make a purchase." App. Vol. 1 at 070. As the district court explained, given this specification, GreenSky could "show acceptance" of the Loan Agreement and its arbitration clause in "one of two ways": Ms. Parisi initiated the Shopping Pass or RBA initiated the Shopping Pass at the direction of Ms. Parisi. App. Vol. 2 at 515. The district court did not err in concluding that GreenSky failed to show either.

As the district court found, "GreenSky has provided no evidence that Parisi herself initiated the Shopping Pass transaction" aside from a conclusory declaration. *Id.* That declaration relies on "an unidentified transaction ledger" showing that the transaction happened, not that Ms. Parisi was the one who initiated it. *Id.* The district court found the lack of evidence that Ms. Parisi initiated the transaction "notable," given that the Loan Agreement's terms state that identification is required for all Shopping Pass purchases. *Id.* Moreover, the court pointed to compelling evidence that it was RBA, not Ms. Parisi, that used the Shopping Pass: a GreenSky representative told Ms. Parisi that the transaction occurred because "[t]he *merchant* charges a percentage upfront on the loan," *id.* at 516 (emphasis added), and Ms. Parisi repeatedly emphasized to GreenSky that she did not authorize the transaction, App. Vol. 3 at 638-39. Thus, it was not clear error for the district court to conclude

that the Shopping Pass "charge was initiated by [RBA], and the charge was promptly and consistently disputed by Parisi." App. Vol. 2 at 516.

Likewise, the district court did not clearly err in finding that Ms. Parisi did not authorize RBA to initiate the Shopping Pass charge on her behalf because any authorization Ms. Parisi gave RBA to move forward with the window project and charge the Shopping Pass—if she even gave that authorization at all, *see supra* Part III—was based on her obtaining the zero-interest loan to finance the purchase. App. Vol. 2 at 516-17. In other words, Ms. Parisi at most authorized RBA to accept a zero-interest loan on her behalf by charging the Shopping Pass, but she did not authorize RBA to charge the Shopping Pass to accept a high-interest loan. *Id.* at 517. To the contrary, she was clear that she could purchase the windows *only* with the help of the zero-interest loan. *See supra* Part III(A)(1), (2); Restatement (Second) of Agency § 33 ("An agent is authorized to do, and to do only, what is reasonable for him to infer that the principal desires him to do in the light of the principal's manifestations and the facts as he knows or should know them at the time he acts").[20] And because

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[20] GreenSky argues (at 54-55) that, because the arbitration agreements in the zero-interest and high-interest Loan Agreements were identical, it does not matter whether Ms. Parisi authorized RBA to charge the Shopping Pass for the high-interest loan. Even if that were true, GreenSky again overlooks the fundamentals of contract formation: no contract was formed for *either* the zero-interest loan *or* the high-interest loan, and thus no arbitration agreement was formed that GreenSky can enforce. To the extent Ms. Parisi was offered a zero-interest loan agreement, that offer, and the arbitration provision within it, was undisputedly withdrawn before she

Ms. Parisi neither initiated the Shopping Pass charge herself nor authorized RBA to do so on her behalf, she did not engage in the conduct required to manifest her assent to the agreement.

GreenSky argues (at 55) that an agreement was formed when the Shopping Pass was used, whether or not Ms. Parisi initiated or authorized the Shopping Pass transaction, and that her arguments about authorization go instead to that agreement's enforceability or validity.[21] But it is black-letter law that "[t]he conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct." Restatement (Second) of Contracts § 19(2); *see* Okla. Stat. tit. 15, § 67 ("Consent can be communicated with effect, only by some act or omission of the party contracting, by which he intends to communicate it."). Here, because the evidence shows that Ms. Parisi neither intended to use the Shopping Pass herself nor intended that RBA use it on her behalf, she did not "intend[] to communicate" her assent and, therefore, the use of the Shopping Pass was not effective as a

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allegedly accepted it through RBA's use of the Shopping Pass. That she may have considered agreeing to arbitration as a condition of the loan she wanted is therefore irrelevant because she never had the opportunity to accept that loan. In its place, she was offered a markedly different, high-interest loan that she did not want, and, as described above, that she did not accept.

[21] As explained above, the cases GreenSky cites are readily distinguishable *see supra* p. 25 n.8, because whether Ms. Parisi authorized RBA to charge the Shopping Pass goes to whether she manifested her assent to the agreement GreenSky seeks to enforce, and thus it is clearly a question of formation, not enforceability or validity.

manifestation of her assent to the terms of the agreement. *See* Okla. Stat. tit. 15, § 67. The fact that RBA used the Shopping Pass anyway *without* her consent does not bind Ms. Parisi to the agreement, even if GreenSky erroneously believed it was authorized. As the Restatement explains, a "'manifestation' of assent is not a mere appearance; the party must in some way be responsible for the appearance." Restatement (Second) of Contracts § 19, cmt. c. "This is true even though the other party reasonably believes that the assent is genuine." *Id.*[22] In short, without some intentional act by Ms. Parisi to accept the terms of the Agreement, there was no mutual assent, and no agreement was formed.

V. The district court correctly denied Defendants' motions to compel arbitration without holding trials.

As a fallback, Defendants complain that the district court should have at the very least proceeded to a summary trial on the question of contract formation before denying their motions. Opening Br. 48, 71-72. But, as RBA acknowledges, a summary trial on the "making of an agreement to arbitrate" is not warranted where, as here, "there are no genuine issues of material fact." *Id.* at 48 (quoting *Hardin*, 465 F.3d at 475). As explained above, neither Defendant presented evidence that the parties formed arbitration agreements beyond copies of the contracts, self-serving

[22] Here, it would have been unreasonable for GreenSky to believe RBA had authorization given GreenSky's documented pattern of enabling merchants to use Shopping Passes without authorization, *see* App. Vol. 1 at 209-10, and its policy of requiring identification before the Shopping Pass was used, *see* App. Vol. 2 at 515.

affidavits that failed to controvert key testimony from Ms. Parisi, and, in the case of GreenSky, a transaction ledger reflecting that the Shopping Pass was used but not by whom. *See* App. Vol. 3 at 549-51, 553-82; App. Vol. 2 at 343-349, 350-56, 371; *see also* App. Vol. 3 at 694 (district court emphasizing that RBA "presente[ed] little factual evidence at all": "the Contract" and a conclusory statement "that the agreement is enforceable because Parisi signed it"); App. Vol. 2 at 519 (district court finding that GreenSky's "conclusory and self-serving affidavit . . . , supported only by the transaction ledger, is not sufficient evidence").

For example, RBA did not provide evidence disputing Ms. Parisi's account of her interactions with the RBA salesperson and that he directed her to sign the iPad only to agree to a credit check and apply for a loan. Nor did it submit evidence countering Ms. Parisi's testimony that the iPad screen showed only a blank place for her signature and no contract terms. Likewise, although GreenSky now contends that the district court should hold a trial on whether Ms. Parisi received the Loan Agreement by email and mail, it submitted absolutely no evidence regarding the emails she received beyond a conclusory and vague declaration stating that she was emailed "a link in which she could access" the Loan Agreement on November 23. App. Vol. 2 at 354. It did not describe which email or link it was referring to—let alone what they said—or how, after clicking on the link, Ms. Parisi could access the Loan Agreement. Nor did it present evidence to rebut Ms. Parisi's testimony that she

received the mailed Loan Agreement after November 29. Moreover, as the district court found, it produced no evidence that Ms. Parisi initiated or authorized the Shopping Pass transaction. *Id.* at 519.

Put simply, Defendants "had the opportunity to present their evidence, and they failed to do so" before the district court." *Wallrich v. Samsung Elecs. Am., Inc.*, 106 F.4th 609, 620 (7th Cir. 2024) (declining to remand for opportunity to present additional evidence where consumer plaintiffs who sought arbitration failed to meet their initial burden of proving existence of a valid arbitration agreement). It's too late now.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's orders denying RBA's and GreenSky's motions to compel arbitration.

August 7, 2024

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested because of the importance of the issues in this case. Argument will enable the Court to ask questions of counsel to facilitate the resolution of these important issues.

CERTIFICATE OF COMPLIANCE

This answering brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2) and this Court's June 25, 2024 order granting Ms. Parisi leave to file an oversized brief because it contains 16,860 words. It complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

August 7, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Tenth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

<u>/s/ Hannah Kieschnick</u>
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