STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
	)	CIVIL ACTION NO. 2023-CP-07-00646
COUNTY OF BEAUFORT	)	
AMBER LEIGH LOVELACE, by and through her Conservator, RICHARD COOLER,	)	
	)	
Plaintiff,	)	ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION
vs.	)	
	)	
STEVEN LOVELACE, REGIONS BANK, CETERA INVESTMENT SERVICES d/b/a REGIONS INVESTMENT SERVICES, and CHRISTOPHER LAZUREK,	)	
	)	
Defendants,	)	
	)	

THIS MATTER came before the Court on November 15, 2023 for a hearing on a Motion to Compel Arbitration filed by Defendants Regions Bank ("Regions"), Cetera Investment Services d/b/a Regions Investment Services ("Cetera"), and Christopher Lazurek. Based on the record before the Court and the arguments made by the parties, I make the following findings of fact and conclusions of law:

In September 2015, when Amber Leigh Lovelace ("Amber") was five (5) years old, her mother died tragically in a motor vehicle accident. As a result, Amber inherited assets including life insurance, and ultimately, proceeds from a settlement for the accident. State law required that Amber have a conservator appointed, and Amber's father, Defendant Steven A. Lovelace ("Lovelace"), was appointed to serve in an Order issued by the Beaufort County Probate Court on February 3, 2016. As a condition of his appointment, Lovelace was required to place all conservatorship funds into one or more restricted accounts from which no funds could be expended

without a prior court order. Financial institutions holding conservatorship funds were also ordered to execute a Restricted Account Agreement, acknowledging the restricted nature of the account(s).

Lovelace opened two conservatorship accounts: (1) An investment account with Cetera; and (2) A savings account with Regions. Defendant Lazurek, a representative of Cetera, signed the required Restricted Account Agreement, which set forth that "any and all withdrawal(s) from said account(s) shall be allowed only upon prior written approval of the Beaufort County Probate Court authorizing a specific withdrawal for a specific amount at a specific time or pursuant to a budget which has been pre-approved by the Court…" The Restricted Account also addressed transfers, requiring that if transfers were made, the financial institution to which funds were transferred must also have a new and separate Restricted Account prior to any transfers to that institution. While no separate Restricted Account Agreement for Regions has been produced, Regions received a copy of the Conservator's Contract and Order of the Probate Court, which set forth that certain transactions required prior court approval. Regions characterized the account as a conservatorship account but failed to set up proper restrictions. In July 2017, just over a year after Lovelace's appointment, he began withdrawing funds from the Regions account without prior authorization from the Probate Court. When the balance on the Regions account got low, he began transferring funds from Cetera to Regions and then withdrew the funds from Regions, all without prior Court order.

Shortly after Lovelace's misdeeds were discovered, he left the jurisdiction and Amber was placed in the care and custody of her maternal grandfather, Richard A. Cooler. By December of 2022, both Cetera and Regions had notice that funds had been removed from both conservatorship accounts without authorization from the Probate Court. Both accounts were frozen at that time so further funds could not be expended by Lovelace.

Richard A. Cooler was appointed as Successor Conservator by the Beaufort County Probate Court by Order dated January 13, 2023. That Order required Cooler to enter a Restricted Account Agreement with Defendants that prohibited any distributions without permission of the Court and provided that, *"[A]ny financial institution entering into a restricted Account Agreement in doing so submits itself to the personal jurisdiction of this Court."*

Once appointed Successor Conservator for Amber, Cooler contacted Regions Bank to provide the Order appointing him as Conservator and to have his name substituted on the conservatorship accounts. On January 30, 2023, Cooler and Amber visited the Beaufort branch for Regions and Cetera and met with bank manager Mark Weeks. During that meeting, Cooler provided Weeks the Order appointing him as Successor Conservator. Weeks prepared paperwork not only for Regions but also for Cetera to update the accounts.

Following Plaintiff's filing of this action against Defendants, Defendants Cetera, Regions, and Lazurek filed a motion to compel arbitration, relying upon provisions allegedly referenced or contained in the documents signed by Cooler in January 2023.

In reviewing the documents filed by Defendants, it appears that the document relied upon by Cetera is entitled "New Account Agreement," despite this being an existing account. According to Cetera, the New Account Agreement was nine pages in length, with the arbitration provisions appearing on Page 9. Plaintiff filed an Affidavit setting forth that he did not receive Pages 7, 8, or 9 of the "New Account Agreement." Page 6 of the document, signed by Cooler, includes the following language: "By signing below, I acknowledge and agree that…(8) I understand that this agreement contains a predispute arbitration clause that is fully set forth in paragraph 20 on page 9 of this form." This language is not in bold print, nor is it capitalized or set apart from the other language in the paragraph. The language on Page 9 sets forth that presuit arbitration applies to

"any dispute between me and you arising out of *this agreement*." [emphasis added.] A plain reading of that language clearly does not extend to the dispute Plaintiff has with the Defendants concerning actions that well predated Cooler's signature on the "New Account Agreement."

The Regions paperwork is entitled "Fiduciary Account Maintenance and Signature Form." Near the signature line is a reference to a "Deposit Agreement," which included arbitration and waiver of jury trial provisions. The "Deposit Agreement" is a 51-page document that Plaintiff states he never received. The Deposit Agreement contains extensive arbitration language, which Defendants argue encompasses the dispute concerning actions that occurred while Defendant Lovelace served as Conservator, well prior to Cooler's appointment as Successor Conservator.

A party seeking to enforce an arbitration agreement has the burden of persuasion to show that the parties entered into an enforceable agreement. *Gordon v. TBC Retail Grp., Inc.,* No. 2:14-cv-03365-DCN, 2016 WL 4247738 (D.S.C. August 11, 2016). Courts rule on a motion to compel arbitration using the summary judgment standard, "[t]hus the question is whether the evidence in the record could support a reasonable jury finding that [Defendant] has proven by 'clear and conclusive evidence'…that an agreement to arbitrate exists between the parties." *Hill v. Emp. Res. Grp., LLC*, 816 F. App'x 804, 809 (4th Cir. 2020). Only after a defendant meets its burden does the burden shift to plaintiff to show that the contract should not be enforced.

Defendants argue the application of the Federal Arbitration Act (FAA). Section 2 of the FAA requires that an arbitration provision be enforced except for "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As such, general contract defenses may apply to invalidate arbitration agreements. *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L.E.2d 902 (1996).

Contract Defenses

In the instant case, Plaintiff argues that the enforcement of the arbitration provisions Defendants purport were included in the documents signed by Plaintiff when he sought to substitute his name for the prior conservator is unconscionable and fails for lack of consideration.

A determination of unconscionability requires a case-by-case analysis. *S.C. Farm Bureau Mut. Ins Co. v. Kennedy*, 398 S.C. 604, 730 S.E.2d 862 (2012). Unconscionability is based on procedural and substantive unconscionability. Both need not be present to the same extent; the more procedurally unconscionable a contract is, the less substantive unconscionability is required, and vice versa. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022).

As our Supreme Court set forth in *Damico*, "the touchstone of the analysis begins with the presence or absence of meaningful choice." *Id.* at 612, 755. Lack of meaningful choice goes to the fundamental fairness of the bargaining process. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016). In the analysis of whether lack of meaningful choice rises to the level to invalidate a contract term, courts should consider factors including relative disparity in the parties' bargaining power and the parties' relative sophistication, the nature of the injuries suffered by the plaintiff, and the conspicuousness of the clause. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669; see generally at 756, 17A Am Jur. 2d Contracts § 272 (listing a number of factors that courts may considering in conducting an unconscionability analysis); 17 C.J.S. Contracts § 10 (same).

The arbitration clauses at issue in this case appear in contracts of adhesion. Plaintiff had no choice but to sign the paperwork when he sought to remove Defendant Lovelace's name from the account and substitute his own name as Successor Conservator. Not only did he state that he did

not receive the arbitration language but he had no opportunity to negotiate the terms of the purported agreement prior to signing. While contracts of adhesion are not per se unconscionable, courts have looked at them with "considerable skepticism," as it remains doubtful "any true agreement ever existed to submit disputes to arbitration," *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663, 670 (2007). *See also* 17A Am. Jur. 2d Contracts § 274 (noting that "[c]ontracts of adhesion are enforceable unless they are unconscionable," but "[n]evertheless, the fact that a contract is one of adhesion is a strong indicator that [there was] an absence of meaningful choice"); 17 C.J.S. Contracts § 9 ("A consumer transaction which is essentially a contract of adhesion may be examined by the courts with special scrutiny to assure that it is not applied in an unfair or unconscionable manner against the party who did not participate in its drafting.").

Like in *Damico*, in which the Court found that the plaintiffs (homebuyers) were much less sophisticated than the defendant (large developer/homebuilder), the case at hand also involves a disparity in sophistication of the parties and a significant disparity in the parties' bargaining power. In the case at bar, we have Regions Bank, a large national bank and Cetera Investment Services, its investment arm, attempting to enforce arbitration provisions that were never provided or explained to a minor child and her maternal grandfather who stepped in as Successor Conservator. In this case, Plaintiff submitted an uncontroverted affidavit that he was not provided with any documentation that included arbitration provisions. Defendants' counter affidavits do not dispute Mr. Cooler's testimony, but rather they merely state that they should have given him the documents containing the arbitration language. It is very telling that neither affidavit filed by the Defendants deny Cooler's testimony; rather they merely state they do not know why he would not have

received the arbitration clauses. I find that Plaintiff lacked a meaningful choice in the ability to negotiate the terms regarding arbitration.

Aside from the disparity in bargaining power and sophistication, I find that the Cetera document, entitled "New Account Agreement" did not provide Plaintiff with conspicuous notice of the arbitration language. On the page signed by Plaintiff, the reference to arbitration is included at the end of a long paragraph, with no bold or capital letters. It is inconspicuous, which is important in light of the consequential nature of the enforcement of the language. It appears that Plaintiff did not receive the remainder of the agreement where the arbitration language appears. Further, even if the purported language were conspicuous and provided to the Plaintiff at the time of signing, the language limits arbitration to matters arising out of "this agreement." Not only do I find that enforcement of the arbitration provisions would be unconscionable, but I also find that the matters in dispute are not covered by the plain language in the arbitration provisions. The matters in dispute at this time involve actions occurred several years prior to Mr. Cooler's involvement in this matter.

While the language in the fifty-one-page Deposit Agreement Regions asserts is much broader than that of Cetera, the reference to the Deposit Agreement on the one-page document is insufficient to bring this matter within the broad arbitration clauses. Making an unsophisticated consumer, visiting the Bank to substitute his name on an existing account, subject to onerous arbitration language purporting to cover activities years prior before his involvement as conservator, is unconscionable.

Lack of Consideration

In the instant case, Plaintiff did not open new accounts; he merely substituted his name on two existing accounts in response to the Probate Court appointing him as Successor Conservator for his minor granddaughter. This fails to qualify as consideration to make the disputes herein subject to the arbitration language contained in the documents for Cetera and Regions.

Jurisdiction

Plaintiff contends the dispute in this matter is subject to the court's jurisdiction and that the parties could not contract around that jurisdiction. In the initial order of the Probate Court appointing Defendant Lovelace as Conservator, the Court required that the parties enter into a "Restricted Account Agreement." Representing Cetera, Defendant Lazurek signed the Restricted Account Agreement, which was later approved by Probate Judge Kenneth E. Fulp, Jr. on March 1, 2016. That Agreement provides the terms that restrict the distribution of funds without order of the court. The Restricted Account Agreement does not contain any arbitration provisions. In fact, the Restricted Account Agreement provides, [T]his Restricted Account Agreement shall be read and construed *in pari materia* with pertinent Court Orders, and this Agreement and such Court Orders are hereby mutually incorporated by reference, one with the other."

In the Court Order appointing Cooler as Successor Conservator the Court specified, "Pursuant to S.C. Code. Ann 62-5-409, the Conservator shall enter into a restricted Account Agreement with the approved financial institution located within the State of South Carolina. Proof of such shall be submitted to the Court within thirty (30) days of this Order." The Order further required restricted account agreements be on file, and further clarified that financial institutions signing restricted account agreements are subject to the Court's jurisdiction.

As described above, there is no arbitration provision existing between the parties, but assuming arguendo that arbitration provisions could be imputed by vague language, Defendants waived arbitration by submitting the jurisdiction of the Court and availing itself of the Court's jurisdiction since the inception of the Restricted Account Agreement entered on February 3, 2016. In fact, the Court retained the jurisdiction of Defendants and any contractual provisions to the contract are void *ab initio*.

I find not only that enforcement of the arbitration clauses would be unconscionable but also that there was no consideration for the agreement to arbitrate. Finally, I find that these matters are within the court's jurisdiction and the parties were not free to contract around that jurisdiction. Therefore, it is ordered, adjudged and decreed that:

Defendants' Motion to Compel Arbitration is denied.

IT IS SO ORDERED!

_____
The Honorable Michael G. Nettles

_____, 2023

_____, South Carolina

Beaufort Common Pleas

Case Caption: Amber Leigh Lovelace , plaintiff, et al VS Steven Lovelace , defendant, et al

Case Number: 2023CP0700646

Type: Order/Compel

So Ordered

s/ The Honorable Michael G. Nettles #2140