

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF MARION )  
 )  
 VERSIE T. PAGE, on behalf of )  
 herself and all others similarly )  
 situated, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SOUTH CAROLINA FEDERAL )  
 CREDIT UNION, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 COURT FILE NO. 2023-CP-33-00574

**ORDER DENYING  
 SOUTH CAROLINA FEDERAL CREDIT  
 UNION’S MOTION TO DISMISS OR, IN THE  
 ALTERNATIVE, MOTION TO STAY AND  
 COMPEL ARBITRATION**

This matter is before the Court on Defendant South Carolina Federal Credit Union’s (“SCFCU’s”) Motion to Dismiss or, in the Alternative, Motion to Stay and Compel Arbitration (the “Arbitration Motion”). The Court, having considered the submissions of the parties, having heard argument on March 18, 2024, and being otherwise duly advised, now finds that the Arbitration Motion should be, and hereby is, DENIED.

The Court finds and concludes as follows:

1. On October 24, 2023, Plaintiff Versie T. Page (“Ms. Page”) filed a Class Action Complaint against SCFCU in this Court. The Complaint alleges that SCFCU improperly assessed and collected from Ms. Page and thousands of other members: (a) \$36.00 overdraft fees (“OD Fees”) on transactions that did not actually overdraw the account; (b) \$36.00 OD Fees on debit card transactions authorized on sufficient funds and (c) multiple \$36.00 fees on an item. Compl. ¶¶ 1, 119. The Complaint alleges that these practices breach SCFCU’s contract with members, violate the duty of good faith and fair dealing, and unjustly enrich SCFCU. Compl. ¶
- 2.

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2. On December 1, 2023, SCFCU filed the Arbitration Motion seeking to have this action dismissed or stayed and compelled to arbitration pursuant to Rule 12(b)(1), (3), and (6) of the South Carolina Rules of Civil Procedure, the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et seq.* (the “SCUAA”), and the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (the “FAA”). In support of the Arbitration Motion, SCFCU submitted only one exhibit, an unauthenticated “Account Agreement,” which contained in paragraph 32 on pages 19–20 an arbitration clause. The arbitration clause provides in part:

[Y]ou and the Credit Union agree that any dispute affecting your accounts and /or services and arising out of or relating to this Agreement will be resolved by **BINDING ARBITRATION** administered by the American Arbitration Association in accordance with its Commercial Dispute Resolution Procedures and Supplementary Procedures for Consumer-Related Disputes. You thus GIVE UP YOUR RIGHT TO GO TO COURT to assert or defend your rights under this Agreement (EXCEPT for matters that may be taken to SMALL CLAIMS COURT). Your rights will be determined by a NEUTRAL ARBITRATOR and NOT a judge or jury. You are entitled to a **FAIR HEARING**, BUT the arbitration procedures are **SIMPLER AND MORE LIMITED THAN RULES APPLICABLE IN COURT**. Arbitrator decisions are as enforceable as any court order and are subject to **VERY LIMITED REVIEW BY A COURT**.

3. SCFCU argued that Ms. Page’s “checking account was made subject to SCFCU’s Account Agreement,” which contained the arbitration clause and that therefore arbitration should be compelled. Arbitration Mot. at 2.

4. On March 13, 2024, Ms. Page responded to the Arbitration Motion. In her response, Ms. Page argued that SCFCU failed to meet its burden to prove that any agreement to arbitrate was formed. Specifically, Ms. Page argued:

While SCFCU’s Arbitration Motion says that Plaintiff’s checking account “was made subject to SCFCU’s Account Agreement,” Mot. ¶ 2, there is no evidentiary foundation for that statement. SCFCU presents no evidence that the Account Agreement was in effect when Plaintiff opened her account, that it was a valid later addition, that it was provided to Plaintiff, or that Plaintiff agreed to its terms or was even aware of them. Simply put, SCFCU has provided no evidence from which the

Court can conclude Plaintiff ever agreed to the terms of the arbitration clause in the “Account Agreement,” and therefore the Court should deny the motion.

Resp. at 1.

5. Ms. Page argued that “SCFCU has not even offered any evidence of what the Account Agreement even is,” that “there is no evidence that SCFCU ever provided the Account Agreement to Plaintiff at initial account opening,” “[n]or is there any evidence that the Account Agreement was provided to Plaintiff after account opening as some sort of addition of new terms. And even if there were such evidence, whether such an addition was effective would depend on the circumstances of the case, as numerous courts have recently held such additions unenforceable.” Resp. at 5–6 (citing cases). Ms. Page also argued that “there is no evidence that Plaintiff assented to the Account Agreement.” *Id.* at 7. Finally, Ms Page argued that SCFCU’s clause had never been registered at the American Arbitration Association (“AAA”), so SCFCU could never have arbitrated under it and that, in fact, SCFCU had continued to act inconsistently with any right to arbitrate by having filed suit in courts across South Carolina for at least three years after SCFCU claimed the mandatory arbitration clause was in effect. *Id.* at 7–9.

6. On March 15, 2024, the Friday before the hearing scheduled for March 18, 2024, SCFCU filed a reply brief, along with an affidavit from Jessica Blackstone (the “Blackstone Aff.”) that attached three exhibits.

7. According to Ms. Blackstone, Ms. Page was originally a member of the Health Facilities Federal Credit Union (“HFFCU”), having opened an account with HFFCU on August 22, 2016. Blackstone Aff. ¶ 3. According to Ms. Blackstone, the HFFCU account agreement contained a “change of terms” clause stating that “we may change the terms of this Agreement at any time. We will notify you of any change in terms, rates, or fees as required by law.” *Id.* at Ex. B ¶ 23.b.

8. According to Ms. Blackstone, in November 2019, HFFCU and SCFCU agreed to a merger under which SCFCU would be the surviving entity. *Id.* ¶ 5.

9. According to Ms. Blackstone, on January 30, 2020, “SCFCU mailed an initial welcome notice to former HFFCU members” which Ms. Blackstone claims informed members that HFFCU terms would be changed to SCFCU terms. *Id.* ¶¶ 6–7.

10. However, the actual “welcome packet” did *not* contain SCFCU’s Account Agreement or any arbitration clause. *See* Blackstone Aff. at Ex. C. The “welcome packet” appears to contain several individual documents that are separately paginated. *Id.*

11. The first document is a one-page letter stating that HFFCU is merging with SCFCU and that customers will “automatically enjoy an increase in benefits.” *Id.* It says nothing about arbitration or class actions, and it does not include any arbitration clause. *Id.*

12. The second document is a four-page document regarding “General Information and Expectations Surrounding Your Products & Services,” as well as “Frequently Asked Questions.” *Id.* The document contains general information on how accounts will transition. *Id.* It says nothing about arbitration or class actions, and it does not include any arbitration clause. *Id.*

13. The third document is a one-page letter relating to consumer loans. *Id.* It says nothing about arbitration or class actions, and it does not include any arbitration clause. *Id.*

14. The fourth and final document is a differently colored (i.e., black and white) “notice.” *Id.* It states that provisions of the SCFCU account agreement may be different and provides a non-exhaustive 11-item list that includes “Arbitration,” though it does not indicate that “Arbitration” is mandatory. *Id.* At the bottom of the list, it says:

In addition, the rates and fees provided in the South Carolina Federal Truth in Savings Rate & Fee Schedule may be different in how dividends are calculated,

paid, and any minimum balances required to earn such dividends. Also, some fees may be different, may be higher (NSF/Courtesy Pay Fee is \$36, Stop Payment \$35, Dormant Account \$10/month after 6 months), or may be lower.

We recommend you review these documents carefully. To obtain a copy, visit our website at <https://www.scfederal.org/Rates/Fee-Schedule> or contact us at 843-519-8300.

*Id.* Again, this document does not include any arbitration clause. *Id.*

15. According to Ms. Blackstone, the “welcome packet” “contained an internet link by which members could download a copy of” SCFCU’s account agreement, but she does not indicate what link that is, nor does she provide a copy of the webpage that was purportedly found at the link. Blackstone Aff. ¶ 7.

16. Finally, according to Ms. Blackstone, Ms. Page’s account was transferred to SCFCU in 2020 and then Ms. Blackstone also added a second account at SCFCU in September 2020, but SCFCU does not claim that it provided Ms. Page with any account agreement or arbitration clause in connection with the opening of the second account.

17. On March 18, 2024, the Court heard argument on the Arbitration Motion.

18. “Arbitration may not be compelled unless the court is satisfied ‘the making of the agreement for arbitration . . . is not in issue.’” *Simmons v. Benson Hyundai, LLC*, 438 S.C. 1, 4, 881 S.E.2d 646, 647 (Ct. App. 2022), *reh’g denied* (Mar. 25, 2022), *cert. denied* (Mar. 30, 2023) (quoting 9 U.S.C § 4). “The ‘making’ or formation of—in the sense of the very existence of—the agreement to arbitrate is always a question for the court, not the arbitrator.” *Id.* (citing *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 296, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010)). A court’s “first step, then, is to decide whether [the parties] formed an agreement to arbitrate. If [a court] conclude[s] they did not, the first step would also be the last because the [Federal Arbitration Act] cannot make parties arbitrate when they have not agreed to do so.” *Id.*

at 6, 881 S.E.2d at 648. In other words, “the [Federal Arbitration Act] does not require parties to arbitrate when they have not agreed to do so.” *Id.* at 5, 881 S.E.2d at 648 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)).

19. “In deciding whether a valid, enforceable and irrevocable arbitration agreement exists, [courts] apply general principles of state contract law.” *Doe v. TCSC, LLC*, 430 S.C. 602, 611, 846 S.E.2d 874, 878 (Ct. App. 2020). In doing so, there is no presumption in favor of arbitration. “Our supreme court has recently returned the legal cliché that the law ‘favors’ arbitration to its proper context, reminding that ‘statements that the law “favors” arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy—federal or state—“favoring” arbitration.’” *Simmons*, 438 S.C. at 4, 881 S.E.2d at 647 (quoting *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021)).

20. “For a contract to arise there must be an agreement between two or more parties. There must be an offer, there must be an acceptance, and there must be a meeting of the minds of the parties involved.” *Rushing v. McKinney*, 370 S.C. 280, 290, 633 S.E.2d 917, 922 (Ct. App. 2006) (quoting *Hughes v. Edwards*, 265 S.C. 529, 536, 220 S.E.2d 231, 234 (1975)). “Under South Carolina law, a contract cannot be formed without a meeting of the minds between the parties as to all essential and material terms.” *Simmons*, 438 S.C. at 7, 881 S.E.2d at 649 (citing *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989)). “The parties must also ‘manifest a mutual intent to be bound.’” *Id.* (quoting *Stanley Smith & Sons v. Limestone Coll.*, 283 S.C. 430, 433, 322 S.E.2d 474, 477 (Ct. App. 1984)). The proponent of a contract bears the

burden of proving these elements, and failure to prove any one of them means arbitration cannot be compelled. *Id.*

21. Here, the Court concludes that SCFCU has failed to meet its burden to prove Ms. Page agreed to the arbitration clause in the SCFCU Account Agreement for several independent reasons.

22. As an initial matter, the evidence presented in SCFCU's initial Arbitration Motion was wholly insufficient to meet SCFCU's burden to prove an agreement to arbitrate was formed. The only evidence SCFCU offered in its Arbitration Motion was an unauthenticated "Account Agreement." But "[i]t is black letter law that evidence must be authenticated or identified in order to be admissible." *State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018). "The requirement of authentication cannot be met by merely offering the writing on its own." *State v. Hall*, 437 S.C. 107, 118, 876 S.E.2d 328, 334 (Ct. App. 2022). In its opening Arbitration Motion, SCFCU did not offer any evidence to authenticate the Account Agreement nor did it offer any evidence that the Account Agreement with the arbitration clause was ever provided to Ms. Page or that she ever agreed to it. Without any evidence of offer, acceptance, and assent, the Court agrees with Ms. Page that SCFCU's original Arbitration Motion failed to meet SCFCU's burden to prove an agreement to arbitrate was formed.

23. For several independent reasons, the Court is also not satisfied that the evidence that SCFCU submitted with its reply brief on the Friday before the Monday hearing is sufficient to prove an agreement to arbitrate was formed.

24. First, the Court disagrees that the "change-of-terms" provision in the HFFCU account agreement permitted SCFCU to unilaterally "add" a new arbitration and class action waiver term that was a subject never contemplated in the original HFFCU agreement. The Court

agrees with the authorities cited by Ms. Page construing similar clauses to allow “changes” to existing account terms, such as fees or rates, but not to allow unilateral “additions” of wholly new terms, such as the arbitration and class waiver here. *See Decker v. Star Fin. Grp., Inc.*, 204 N.E.3d 918 (Ind. 2023) (“We hold that the account agreement’s change-of-terms clause did not allow the Bank to add the [arbitration] addendum.”); *Pruett v. WESTconsin Credit Union*, 2023 WI App 57, ¶ 21, 409 Wis. 2d 607, 998 N.E.3d 529 (2023) (surveying caselaw from numerous jurisdictions and concluding that “[t]he plain language of WCU’s change-of-terms [c]lause permitted WCU only to unilaterally ‘change terms of this Agreement,’ not to unilaterally ‘add new terms that are not the subject of this Agreement,’ such as the Arbitration Clause.”); *see also id.* ¶ 45 (holding that unilateral addition of arbitration clause would also be invalid as violating the duty of good faith and fair dealing) (citing *Sevier Cnty. Schs. Fed. Credit Union v. Branch Banking & Tr. Co.*, 990 F.3d 470 (6th Cir. 2021)).

25. Second, there was no reasonable notice to Ms. Page of the arbitration clause and therefore the Court cannot conclude she agreed to it. “As a general principle, an offeree cannot actually assent to an offer unless the offeree knows of its existence.” Williston on Contracts § 4:16, *Communications of offers* (4th ed.) (citing Restatement (Second) of Contracts § 23); *Douglas v. U.S. Dist. Ct. for Cent. Dist. of California*, 495 F.3d 1062, 1066 (9th Cir. 2007) (“Even if [the plaintiff’s] continued use of [a] service could be considered assent, such assent can only be inferred after he received proper notice of the proposed changes.”). The “meeting of the minds” necessary for contract formation requires that there be reasonable notice of an offer, a standard that appears universal across jurisdictions. *See, e.g., Sarchi v. Uber Techs., Inc.*, 2022 ME 8, ¶ 25, 268 A.3d 258, 269 (contract formation requires “essential requisites of reasonable notice”); *Kauders v. Uber Techs., Inc.*, 159 N.E.3d 1033, 1054 (Mass. 2021) (holding no

agreement to arbitrate because “[a]s we conclude that there was not reasonable notice of the terms, a contract cannot have been formed here.”); *Gibbs v. Firefighters Cmty. Credit Union*, 2021-Ohio-2679, ¶ 16, 177 N.E.3d 294, 299, *appeal not allowed*, 2021-Ohio-4289, 177 N.E.3d 994, *reconsideration denied*, 2022-Ohio-397, 180 N.E.3d 1179 (no agreement to arbitrate proven where “the record fails to demonstrate sufficient notice was sent such that there was a ‘meeting of the minds’”); *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 290–96 (2d Cir. 2019) (no agreement to arbitrate where defendant failed to show reasonable notice of arbitration clause); *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 64 (1st Cir. 2018) (no arbitration agreement formed where terms “were not reasonably communicated to the Plaintiffs”); *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1035–36 (7th Cir. 2016) (defendant failed to show agreement to arbitrate because it failed to provide “reasonable notice” of offer).

26. Here, SCFCU never delivered the SCFCU Account Agreement containing the arbitration clause to Ms. Page. There was no arbitration clause in the HFFCU account agreement that Ms. Page originally signed, the “welcome packet” for the merger into SCFCU did not contain any arbitration clause, and there is no evidence that SCFCU provided the arbitration clause to Ms. Page when she opened a second checking account at SCFCU. At best, Ms. Blackstone claims that the “welcome packet” “contained an internet link by which members could download a copy of” SCFCU’s account agreement, but Ms. Blackstone does not indicate what link that is, nor does she provide a copy of the webpage that was purportedly found at the link. Blackstone Aff. ¶ 7. This is insufficient evidence of what notice was actually provided. And, at any rate, a link placed inconspicuously at the back of a “welcome packet” that requires a member to locate the link, type it into a web browser, and potentially follow other links to reach the arbitration clause is not clear and conspicuous notice nor is it reasonably calculated to alert a

member to important terms, such that the Court cannot conclude there was sufficient notice for there to exist agreement to arbitrate here. *See Sgouros*, 817 F.3d at 1035 (“we cannot presume that a person who clicks on a box that appears on a computer screen has notice of all contents not only of that page but of other content that requires further action (scrolling, following a link, etc.)”); *Gibbs*, 2021-Ohio-2679, ¶ 17 (notice was not reasonable even where email attached the arbitration clause itself where “the email did not call attention to the arbitration provision or opt-out requirements”).

27. Finally, although the lack of proper notice alone is sufficient to deny the motion, SCFCU’s failure to register its arbitration clause with the AAA for the more than three years it claims it has been in effect also calls into doubt whether SCFCU ever truly intended to engage in mandatory arbitration or whether it instead acted contrary to the clause by engaging in litigation when it chose. As Ms. Page points out, SCFCU has never actually arbitrated against any customer because AAA will not arbitrate a non-registered clause. Consumer Arbitration Rules R-12, R-1(d). *See Bedgood v. Wyndham Vacation Resorts, Inc.*, 88 F.4th 1355, 1371 (11th Cir. 2023) (affirming denial of motion to compel arbitration where AAA refused to serve as arbitrator for failure to comply with AAA policies); *Merritt Island Woodwerx LLC v. Space Coast Credit Union*, No. 6:23-CV-1066-PGB-DCI, 2023 WL 8699470, at \*8 (M.D. Fla. Dec. 15, 2023) (denying motion to compel arbitration where credit union failed to pay and register its arbitration clause and so AAA declined arbitration). The very fact that there is no evidence that SCFCU has ever complied with its own purportedly mandatory arbitration provision that it now seeks to invoke and that it potentially continues to sue in court, undermines that there is any true agreement to arbitrate and therefore also supports that arbitration should not be compelled.

28. In short, SCFCU has the burden to prove an agreement to arbitrate was formed before it is entitled to an order compelling arbitration. SCFCU has failed to meet that burden here. Accordingly, the Arbitration Motion is DENIED.

SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Hon. Michael G. Nettles, Judge



Marion Common Pleas

**Case Caption:** Versie T Page , plaintiff, et al VS South Carolina Federal Credit Union  
**Case Number:** 2023CP3300574  
**Type:** Order/Other

So Ordered

s/ The Honorable Michael G. Nettles #2140