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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No.: 2024-001597
Case No.: 2023-CP-33-00574

Versie T. Page, on behalf of herself and all others similarly situated .....Respondent,

v.

South Carolina Federal Credit Union.....Appellant.

INITIAL BRIEF OF RESPONDENT

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I. A party cannot agree to terms without reasonable notice of them. Other than referencing an "internet link" at the back of a "welcome packet," the appellant credit union provided no evidence it notified the respondent member that it was adding an arbitration and class action waiver term to her account agreement, and the credit union never actually sent her that term or placed the contents of the "internet link" in the record. Did the trial court correctly find that the credit union failed to meet its burden to prove the member had reasonable notice to agree to the term?

II. An arbitration agreement cannot exist without mutual promises by the parties to resolve their disputes through arbitration. The member's original account agreement did not address dispute resolution, but a "change of terms" clause purported to give the credit union the right to "change" the terms of the agreement at any time. Did the trial court correctly conclude that the "change of terms" clause did not allow the credit union to unilaterally add new arbitration and class waiver terms that were never before topics of the account agreement?

III. A party asserting equitable estoppel has the burden to establish all its elements. The credit union waited until its motion to reconsider the order denying arbitration to assert that, by suing for breach of a fee schedule and opt-in form, the member was estopped from avoiding an

arbitration term in a separate document. But the credit union did not provide any evidence that the promise the member sued over contained or incorporated an arbitration term, nor was there any evidence the credit union had incomplete knowledge and detrimentally relied on the members conduct. Did the trial court correctly decline to estop the member from refusing to arbitrate?

IV. Appellants in South Carolina must preserve issues for appellate review by raising and addressing them in their initial briefs and statement of issues. In denying the credit union's arbitration motion, the trial court held that the credit union waived its ability to compel arbitration by failing to comply with its own purportedly mandatory arbitration provision. The credit union has not challenged or even mentioned that holding on appeal. Should this Court affirm the trial court's denial of the arbitration motion on the independent basis that the waiver holding is unchallenged?

INTRODUCTION

Respondent Versie T. Page ("Ms. Page") filed this case as a class action against South Carolina Federal Credit Union ("SCFCU") relating to certain overdraft fees that Ms. Page alleges SCFCU unlawfully charged.

Although Ms. Page was originally a member of Health Facilities Federal Credit Union ("HFFCU"), she became a member of SCFCU in 2019 when HFFCU merged into SCFCU. Ms. Page's original account agreement with the credit union did not contain an arbitration agreement, and there is no evidence that Ms. Page ever agreed to waive her right to bring a lawsuit against SCFCU. Even so, SCFCU sought to compel Ms. Page to individual arbitration, arguing that the parties formed an arbitration agreement when SCFCU unilaterally added arbitration and class waiver terms to its account agreements, even though it never sent those terms to Ms. Page.

The trial court disagreed, denying SCFCU's motion to compel and its motion to reconsider. In doing so, the trial court correctly applied the principles of South Carolina contract law to the facts that it found based on the record. The trial court's decisions do not contain any legal errors or unsupported factual findings that require correction. This Court should affirm.

STATEMENT OF THE CASE

I. Ms. Page sues SCFCU in a class action for assessing overdraft fees that did not overdraw customers' accounts and for charging multiple fees on single items.

On October 24, 2023, Ms. Page filed a Class Action Complaint against SCFCU. The Complaint alleges that SCFCU improperly assessed and collected from Ms. Page and thousands of other members: (a) $36.00 overdraft fees on transactions that did

not actually overdraw the accounts; (b) $36.00 overdraft fees on debit card transactions authorized on sufficient funds; and (c) multiple $36.00 fees on a single item, such as a single check or ACH transaction. (Compl. ¶¶ 1, 119.) The National Credit Union Administration, which regulates SCFCU, has called the assessment of these fees "antithetical to the purpose of credit unions, detrimental to members, and inconsistent with the credit union system's statutory mission of meeting the credit and savings needs of consumers, especially those of modest means." (Compl. ¶ 12 (quoting NCUA Chairman Todd M. Harper Remarks at the Indiana Credit Union League dated May 19, 2023, available at https://ncua.gov/newsroom/speech/2023/ncua-chairman-todd-m-harper-remarks-indiana-credit-union-league).)

The Complaint alleges that SCFCU's fee practices breach the Account Disclosures (a version of the Account Disclosures, which is titled "Truth-in-Savings/Rate and Fee Schedule" and dated effective July 28, 2023, is attached as Exhibit A to the Complaint) and the Overdraft Opt-In Form (an undated version is attached to the Complaint as Exhibit B). The Complaint also asserts a claim for unjust enrichment, in the alternative.

II. SCFCU moves to compel individual arbitration, but the parties' original agreement did not contain any arbitration clause or class action waiver, and SCFCU never sent Ms. Page a purportedly unilaterally changed agreement that contained such new terms.

On December 1, 2023, SCFCU filed its motion seeking to compel individual arbitration. The only evidence that SCFCU submitted in support was an unauthenticated "Account Agreement" dated February 2020. No Truth-in-

Savings/Rate and Fee Schedule" or "Overdraft Opt-In Form" were included. The "Account Agreement" contains different revision dates on different pages. (*Contrast* Account Agreement at p.1 (listing an effective date of "February 2020") *with id.* at p.2 (listing "Rev. 9/14") *with id.* at p.4 (listing "Rev. 02/2020").) It is not signed. SCFCU did not submit any "signature card" or other document that incorporated the "Account Agreement." On the twenty-third page of the "Account Agreement" is an arbitration clause. (*Id.* at p.23 ¶ 32.)

SCFCU's motion to compel arbitration was set for argument on March 18, 2024.

On March 13, 2024, Ms. Page filed her response. She argued that SCFCU had wholly failed to meet its burden to prove an agreement to arbitrate had been formed:

> SCFCU does not provide any affidavit attesting to what the Account Agreement actually is. SCFCU provides no testimony at all relating to the Account Agreement or any other fact. Indeed, SCFCU provides no evidence that the Account Agreement was in place when Plaintiff became a member, that it was a valid addition to an existing agreement, or that it was ever even provided to Plaintiff or that she agreed to it or had any awareness of it.

(Response at p. 3.)

In addition, Ms. Page argued that, even if there were an agreement to arbitrate, SCFCU was in default of that agreement. (Response at pp. 7–10.) Specifically, Ms. Page argued that although the arbitration clause that SCFCU pointed to required all disputes to be arbitrated at the AAA, in over three years SCFCU had never arbitrated any disputes at the AAA and had, instead, continued to sue members in court. (*Id.*) Indeed, Ms. Page showed the Court that SCFCU had

never even registered its clause with the AAA and cited cases finding such behavior resulted in waiver of any right to arbitrate. (*Id.* (collecting cases).)

In a reply brief, filed the Friday before the Monday hearing, SCFCU submitted an affidavit from Jessica Blackstone, a Senior Risk Analyst. (Blackstone Aff.) According to Ms. Blackstone, Ms. Page was originally a member of a different credit union, HFFCU, having opened an account with HFFCU on August 22, 2016, by signing a signature card. (Blackstone Aff. ¶ 3.) The HFFCU account agreement did *not* contain any terms relating to arbitration or class actions. (Blackstone Aff. Ex. B.)

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.)

In November 2019, HFFCU and SCFCU agreed to a merger under which SCFCU would be the surviving entity. (*Id.* ¶ 5.)

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.)

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.*)

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.* at pp. 1–2.) It says nothing about arbitration or class actions, and it does not include any arbitration clause. (*Id.*)

The second document is a four-page document regarding "General Information and Expectations Surrounding Your Products & Services," as well as "Frequently Asked Questions." (*Id.* at pp. 3–6.) 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.*)

The third document is a one-page letter relating to consumer loans. (*Id.* at pp. 7–8.) It says nothing about arbitration or class actions, and it does not include any arbitration clause. (*Id.*)

The fourth and final document is a differently colored (i.e., black and white) "notice." (*Id.* at 9.) 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 or discussion of class actions. (*Id.*)

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 did not indicate what link that is, nor did she provide a copy of the webpage that was purportedly found at the link. (Blackstone Aff. ¶ 7.)

The "Governing Law" provision in both the HFFCU agreement and the SCFCU agreement (which was never sent to Ms. Page) both provide that "any legal action regarding this Agreement shall be brought in the county in which the credit union is located." (*Compare* Blackstone Aff. Ex. B ¶ 34 *with* Mot. Ex. 1 ¶ 31.)

Finally, according to Ms. Blackstone, Ms. Page's account was transferred to SCFCU in 2020 and Ms. Page added a second account in September 2020. (Blackstone Aff. ¶ 9.) But, again, SCFCU did not claim that it provided Ms. Page with any account agreement or arbitration clause in connection with the opening of the second account. (*Id.*)

In its reply, SCFCU did not submit any evidence in response to Ms. Page's arguments that SCFCU continued to sue members in court and that it had never registered its arbitration clause with the AAA.

III. The trial court hears and denies SCFCU's motion to compel arbitration and its motion to reconsider.

After a hearing, the trial court denied the motion to compel arbitration. The trial court concluded that SCFCU had "failed to meet its burden to prove Ms. Page

agreed to the arbitration clause in the SCFCU Account Agreement for several independent reasons." (Order Denying Mot. to Compel Arbitration ("Order") ¶ 21.)

The trial court first explained that "[i]n its opening Arbitration Motion, SCFCU did not offer any evidence to authenticate the Account Agreement [that purports to contain the arbitration and class waiver terms] 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." (Order ¶ 22.)

The Court then turned to SCFCU's reply, holding that "[f]or 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." (Order ¶ 23.)

As the trial court explained, "first, the Court disagrees that the 'change-of-terms' provision in the [original] account agreement permitted SCFCU to unilaterally 'add' a new arbitration and class action waiver term that was a subject never contemplated in the original [account] 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." (Order ¶ 24.)

Second, as an independent reason for denying the motion, the trial court found that "there was no reasonable notice to Ms. Page of the arbitration clause and

therefore the Court cannot conclude she agreed to it." (Order ¶ 25.) The trial court found that

> SCFCU never delivered the SCFCU Account Agreement containing the arbitration clause to Ms. Page. There was no arbitration clause in the [original] 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, [SCFCU's witness] claims that the 'welcome packet' 'contained an internet link by which members could download a copy of' SCFCU's account agreement, but [the witness] 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.

(Order ¶ 26.) The trial court continued that "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 [an] agreement to arbitrate here." (Order ¶ 26.)

Finally, the trial court found that "although the lack of proper notice alone is sufficient to deny the motion, SCFCU's failure to register its arbitration clause with the American Arbitration Association ("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. . . . . 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." (Order ¶ 27.)

The trial court concluded: "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." (Order ¶ 28.) The trial court accordingly denied the motion.

SCFCU filed a motion to reconsider. After a hearing on the motion to reconsider, the trial court denied it as well.

SCFCU filed a notice of appeal on September 23, 2024.

STANDARD OF REVIEW

An order denying a motion to compel arbitration is "subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not reverse those findings." *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 554, 813 S.E.2d 292, 297 (Ct. App. 2018) (citing *Aiken v. World Fin. Corp.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007)).

ARGUMENT

I. The Court should affirm because SCFCU failed to meet its burden to prove an enforceable agreement to arbitrate for three independent reasons.

This Court should affirm the trial court's denial of SCFCU's motion to compel arbitration. The trial court gave three independent reasons for denying SCFCU's motion to compel arbitration: (1) lack of notice; (2) invalid unilateral addition of new

terms; and (3) waiver. As set forth below, any one of these three reasons is sufficient alone to affirm.[1]

"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 (2010)). "A party seeking to compel arbitration must demonstrate the existence of a valid contract to arbitrate by establishing" the three elements of contract formation: "(1) an offer, (2) acceptance of the offer, and (3) the mutual exchange of benefits the law calls 'consideration.'" *Lampo v. Amedisys Holding, LLC*, Op. No. 28265 (S.C. Sup. Ct. filed Mar. 5, 2025) (Davis Adv. Sh. No. 10 at 23) [available on Westlaw at 2024 WL 5444308] (citing *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003); *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019)).

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." *Simmons*, 438 S.C. at 6, 881 S.E.2d at 648.

[1] Indeed, if the Court affirms for any one of these three reasons it need not even analyze the others, as each provides a sufficient and independent basis for affirmance.

"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)); *see also Lampo*, Op. No. 28265 (Davis Adv. Sh. No. 10 at 28–29) ("We remind our litigants and lower courts that we dispensed with this incorrect notion almost four years ago.").

"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)). "[A]n agreement to arbitrate is—by definition—a bilateral contract." *Lampo*, Op. No. 28265 (Davis Adv. Sh. No. 10 at 25).

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. *Simmons*, 438 S.C. at 7, 881 S.E.2d at 649; *see also Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC*, 993 F.3d 253, 258 (4th Cir. 2021) ("[T]he burden is on the defendant to establish the existence of a binding contract to arbitrate the dispute."). "Trial by jury is a substantial right and any waiver thereof must be strictly construed." *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992).

A. The trial court's finding that SCFCU failed to give reasonable notice to form an agreement is supported by the evidence as it is undisputed that SCFCU never sent the arbitration terms to Ms. Page.

The first basis for affirmance is the trial court's finding that "there was no reasonable notice to Ms. Page of the arbitration clause and therefore the Court cannot conclude she agreed to it." (Order ¶ 25.) This correctly states the law and is factually supported by the record. *See Hodge*, 422 S.C. at 554, 813 S.E.2d at 297.

The "change-of-terms" clause from the HFFCU agreement that SCFCU relies on itself expressly states: "We will notify you of any change in terms, rates, or fees as required by law." (Blackstone Aff. Ex. B at ¶ 23.) And the law requires "reasonable notice" of any offer to change terms because, by definition, "[a]n offer is the manifestation of willingness to enter into a bargain, so made as to justify another

person in understanding that his assent to that bargain is invited and will conclude it." *Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) (quoting Restatement (Second) of Contracts § 24 (1981)). Indeed, SCFCU cites to *Fleming v. Borden, Inc.*, 316 S.C. 452, 463, 450 S.E.2d 589, 596 (1994), which recognized that, even in the unilateral contract context (not present here), there must be reasonable notice of any modification and "the reasonable notice requirement for modification requires *actual* notice." *Id.* (emphasis added). "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); *see also 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.").

This standard of reasonable notice appears to be consistent 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).

Here, the trial court correctly found that "there was no reasonable notice to Ms. Page of the arbitration clause and therefore the Court cannot conclude she agreed to it." (Order ¶ 25.) This finding is supported by the evidence. It is undisputed that SCFCU never sent 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" following 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, SCFCU's affiant claimed that the "welcome packet" "contained an internet link by which members could download a copy of" SCFCU's account agreement, but the affiant did 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.) As the trial court correctly found, "This is insufficient evidence of what notice was actually provided." (Order ¶ 25.) Indeed, the text of the link itself appears to indicate

it directs to a Fee Schedule, not any arbitration terms. (Blackstone Aff. Ex. C. at p. 10.)[2]

And, as the trial court went on, "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." (Order ¶ 25; *see also* Apr. 12, 2025 Tr. at 9:23–10:3 ("And the link, they don't give you the evidence of where that link actually goes. I went onto to the – I went to where that link goes. That link goes to a page of other links. So, you have to search through again – you have to jump different hoops.") This is supported by the law. *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").

[2] As of April 8, 2025, the link does, in fact, direct to a listing of fees and not to an account agreement or arbitration and class action waiver terms. *See* https://www.scfederal.org/Rates/Fee-Schedule (as visited on Apr. 8, 2025). There is no evidence it has ever directed anywhere else.

SCFCU tries to distract from this conclusion by citing to cases involving the presumption of receipt of a mailed document.[3] But not only did SCFCU not meet the

[3] Defendant's reliance on *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909 (N.D. Tex. 2000), is misplaced for several reasons. First, unlike here, in *Marsh* and the cases cited by *Marsh*, proof of mailing was established by testimony from persons with firsthand knowledge involved in the mailing and with knowledge of the customary mailing practices and quality controls relating to mailings. *Id.* at 918 (vice president of operations for mailing company who had firsthand knowledge regarding mailing "testified at length concerning the routine business practice [relating to mailings]," the "quality control process" employed by the mailer, and that mailings were "physically inspect[ed]" to ensure notice was included); *Wells Fargo Bus. Credit v. Ben Kozloff, Inc.*, 695 F.2d 940, 944 (5th Cir. 1983) (testimony from witness who saw letter in envelope sealed and mailed in the same manner as prior letter that was received); *Myer v. Callahan*, 974 F. Supp. 578, 587–88 (E.D. Tex. 1997) (testimony from person who personally mailed letter); *Mount Vernon Fire Ins. Co. v. East Side Renaissance Assocs.*, 893 F Supp. 242, 246 (S.D.N.Y. 1995) (testimony from two employees who had "personal knowledge of the regular office practice and procedure" relating to mailing of specific governmental form).

Indeed, "[a] party giving a sworn statement about mail practices must 'have personal knowledge of the procedures in place at the time of the mailing.'" *Amansec v. Midland Credit Mgmt., Inc.*, No. 2:15-cv-08798-SDW-SCM, 2019 WL 3883628, at *5 (D.N.J. July 18, 2019) (denying motion to compel arbitration where defendant failed to prove through witness with firsthand knowledge of mailing that mailbox rule applied) (quoting *Lupyan v. Corinthian Colls. Inc.*, 761 F.3d 314, 320 (3d Cir. 2014) (party failed to prove mailbox rule applied)). "[B]are assertions . . . by affiants who were not personally involved in the mailing process [a]re insufficient to establish receipt through the mailbox rule." *Taylor v. CDS Advantage Solutions*, No. 20-2803, 2021 WL 1712278, at *4 (D.N.J. Apr. 30, 2021). In other words, "second-hand accounts cannot invoke the mailbox rule's presumption." *Guerrera v. Consol. Rail Corp.*, 936 F.3d 124, 137 (3d Cir. 2019).

Here, SCFCU's motion provided no evidence relating to mailing at all. And, in its reply, submitted the last business day before the hearing, SCFCU submitted an affidavit that fails to establish the affiant had firsthand involvement in any mailing or was familiar with the mailing procedures in place at the time. Thus, SCFCU did not even meet its burden to establish any mailing.

In addition, in *Marsh*, unlike here, the notice that was sent specifically informed customers that "a provision providing that any disputes between you and

requirements to prove receipt of the "welcome packet" under those very cases, the cases are irrelevant. That is because, even assuming Ms. Page received the "welcome packet," the trial court correctly found that packet did *not* contain the arbitration and class action waiver terms and therefore did not provide adequate notice. Again, "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 [an] agreement to arbitrate here." (Order ¶ 25 (collecting cases).)[4]

Lack of notice alone is sufficient to affirm the trial court's denial of the motion to compel arbitration because, without proper notice, SCFCU cannot prove an agreement to arbitrate was formed. The trial court's ruling on this ground is dispositive of this matter.

[the bank] are to be resolved by arbitration is being added to your . . . Cardmember Agreement." *Id.* at 916.

[4] Indeed, contrary to SCFCU's suggestion, Appellant's Br. at 15 n.3, there is no need for any further discovery on this issue because the trial court found the actual "notice" submitted by SCFCU to be inadequate, and all of the information relating to that notice was within SCFCU's control to submit with its papers.

B. The trial court correctly held that the "change in terms" clause in HFFCU's agreement did not permit SCFCU to "add" wholly new arbitration and class action waiver terms.

Even if SCFCU had given proper notice of the arbitration clause, however, the trial court correctly held that it could not unilaterally add wholly new arbitration and class action waiver terms by notice alone.

SCFCU relies on a "change of terms" clause in the HFFCU agreement, but numerous courts have held that similar "change in terms" clauses do *not* authorize one party to "add" arbitration and class action terms by notice alone when such terms were not part of the parties' original agreement.

"[T]erms in a contract provision must be construed using their plain, ordinary and popular meaning." *Fritz–Pontiac–Cadillac–Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994). Here, under the plain language of the "change of terms" clause, customers agreed at most to changes to existing account terms, not to additions of wholly new terms. Specifically, the "change of terms" clause states: "Except as prohibited by applicable law, we may change the terms of this Agreement at any time." (Blackstone Aff. Ex. B ¶ 23.b.)

Merriam-Webster Dictionary defines "change" as "to make different"; to "alter," to "transform," or "to replace with another." Merriam-Webster Dictionary, at https://www.merriam-webster.com/dictionary/change (last accessed April 8, 2025). The clause limits which terms can be "replace[d] with another" to "the terms of this Agreement." In other words, the plain and ordinary meaning of the clause is that, at most, SCFCU may replace existing account terms, such as raising or lowering existing interest rates, not unilaterally add wholly new terms on new topics.

This is the exact conclusion the Indiana Supreme Court recently reached when analyzing a materially identical change-of-terms provision and finding an attempt to unilaterally add a new arbitration and class action waiver term was invalid. Similar to here, the change-of-terms clause in *Decker v. Star Financial Group, Inc.*, 204 N.E.3d 918, 919–20 (Ind. 2023), read: "We may change any term of this agreement."

After learning of potential class-wide liability for overdraft fees, the bank in *Decker* relied on this change-of-terms clause to add an arbitration and class action waiver provision by emailing the new terms to customers. When a customer later sued in a class action, the bank moved to compel arbitration, and the trial court granted the motion. The Indiana Supreme Court reversed, explaining:

> The Bank proceeded here as if the account agreement's change-of-terms clause gave it a blank check to amend the agreement any way it saw fit to fend off threatened litigation. But Section 10 [regarding change of terms]—which the Bank itself wrote—is not so elastic. This section does not say the Bank can change the agreement however it wants. If the Bank wanted such flexibility, it might have given itself the power to "change this agreement" as desired. Instead, the section is more limited in scope. It limits the Bank to changing "**any term** of this agreement."

Id. at 921 (emphasis original).

Other courts have reached the same result—that similar change-of-terms clauses did not allow the addition of new terms on arbitration—but have done so by finding similar "change-of-terms" language to be ambiguous and construing that ambiguity against the banks as drafters. For example, in *Sears Roebuck & Co. v. Avery*, 593 S.E.2d 424, 429 (N.C. Ct. App. 2004), the North Carolina Court of Appeals found that a change-of-terms clause that did not mention "adding" new terms was ambiguous. As the court explained, the "agreement was susceptible of either the

interpretation (1) that Sears was allowed to add wholly new terms as well as modify existing terms; or (2) that Sears could only modify existing terms. It was, therefore, ambiguous." *Id.* at 433–34. Construing the ambiguity against the drafter, the court held that "the parties did not intend that the change of terms provision should permit the [defendant] to add new contract terms that differ in kind from the terms and conditions included in the original agreements." *Id.* (quoting *Badie v. Bank of Am.*, 67 Cal. App. 4th 779 (1998)). The court cited the Restatement (Second) of Contracts § 211 (1981) and concluded that "[b]ecause the arbitration clause was a wholly new term that did not fall within the universe of subjects included in the original agreement, [defendant] did not have authority under its 'Change of Terms' provision to condition continued use of its credit card on acceptance of the arbitration clause." *Sears*, 593 S.E.2d at 434.

Similarly, in *Maestle v. Best Buy Co.*, No. 79827, 2005 WL 1907282, at *6 (Ohio Ct. App. Aug. 11, 2005), a credit card company's change-of-terms clause authorized it to "change or amend the terms of this Agreement" but did not say new provisions could be "added." The Ohio Court of Appeals held the clause did not authorize the addition of an arbitration term because customers could not reasonably anticipate such a material addition when no provision in the original agreement addressed alternative dispute resolution. *Id.* Rather, the change-of-terms clause "only permitted the Bank to 'change or amend,' but not add, terms." *Follman v. World Fin. Net. Nat'l Bank*, 721 F. Supp. 2d 158, 165 (E.D.N.Y. 2010) (quoting *Maestle*, 2005 WL 1907282, at *1, *6).

The California Court of Appeals in *Badie* reached the same conclusion. 67 Cal. App. 4th at 787. There, the court held that a clause in a credit card agreement that only permitted the bank to make a "change" to the agreement, but not to "add" new terms, "is reasonably susceptible to the interpretations offered by both sides." *Id.* at 800. Construing the clause against the drafter, the Court held that the parties did not agree that new terms relating to arbitration could be unilaterally added when there were no existing alternative dispute resolution terms. *Id.* The court noted prior versions had explicitly included the language "add new terms" but the version at issue did not. *Id.*

In *Sevier County Schools Federal Credit Union v. Branch Banking and Trust Co.*, 990 F.3d 470, 480 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 2770 (U.S. 2022), the Sixth Circuit adopted the same reasoning as *Badie* in finding that a change-of-terms provision was not an agreement that the bank could add a new term on arbitration. The Sixth Circuit noted that "nothing about the original terms would have alerted a customer to the possibility that the Bank might one day in the future invoke the change of terms provision to add a clause that would allow it to impose ADR on the customer" when the original agreement did not contemplate it. *Id.* at 479 (citing *Badie*, 79 Cal. Rptr. 2d 273).

Recently, the Wisconsin Court of Appeals reached the same conclusion in *Pruett v. WESTconsin Credit Union*, 2023 WI App 57, ¶ 41, 409 Wis. 2d 607, 637, 998 N.W.2d 529, 544, *review denied*, 2024 WI 33, ¶ 41, 9 N.W.3d 277. In construing the change-of-terms provision, the court noted that its "construction is the same one

reached by the courts in *Badie*, *Maestle*, *Sears*, and *Sevier*, and it uses the plain meanings of the words [the credit union] chose." *Id.* Thus, there is ample authority that the change-of-terms clause in the HFFCU agreement either unambiguously does *not* apply to additions of new terms at all, as *Decker* held, or is, at best, ambiguous and must be construed against the credit union as the drafter, as *Badie*, *Maestle*, *Pruett*, *Sears*, and *Sevier* held. Either way, the trial court was correct that the clause did not permit the unilateral addition of an arbitration and class action waiver.

SCFCU's reliance on *Canteen v. Charlotte Metro Credit Union*, 386 N.C. 18, 900 S.E.2d 890 (2024), to argue that the addition of the arbitration clause and class waiver was a "change" to its "Governing Law" provision is misplaced for several reasons. First, it is undisputed that no term addressed class actions and that the forum selection portion of the "Governing Law" *was not changed* between the original HFFCU agreement and the SCFCU agreement SCFCU submitted. The "Governing Law" provision in both the HFFCU agreement and the SCFCU agreement (which was never sent to Ms. Page) both provide that "any legal action regarding this Agreement shall be brought in the county in which the credit union is located." (*Compare* Blackstone Ex. B at ¶ 34 ("Governing Law" section of HFFCU agreement) *with* Mot. Ex. 1 at ¶ 31 ("Governing Law" section of SCFCU document). The arbitration and class action waiver terms are an additional section with additional terms *not* a change to the existing forum selection clause.

In *Pruett*, the Court strongly rejected SCFCU's very argument:

> [T]here is no question that under the Agreement any legal action shall be brought in the county in which the credit union is located. But, again,

> the Arbitration Clause does not change or modify either of those requirements. For example, the Agreement was not modified to apply Illinois law or provide that matters could be heard in all counties of this state, which would encompass modifications or changes to the original Agreement.
>
> Instead, the Arbitration Clause adds substantive limitations to the manner in which a legal action may be heard and the type of claim that can be filed. The Arbitration Clause introduces additions to the contract limiting the rights of the parties on issues that were not contemplated in the original Agreement—arbitration and class actions—rather than amending existing terms. *See* Restatement (Second) of Contracts § 211 cmt. f (Am. L. Inst. 1981) ("Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation."). As Pruett argues, "[a] customer who agreed to a term involving the location of the court where he could file suit would not reasonably understand that doing so would permit WCU to later unilaterally remove the right to go to court at all." *See Sears*, 593 S.E.2d at 434 (citing *Badie*, 79 Cal. Rptr. 2d at 289).

2023 WI App 57, ¶¶ 40–41, 409 Wis. 2d at 637, 998 N.W.2d at 544.

The dissent in *Canteen* noted this same point: "An arbitration amendment and class action waiver is not foreseeable, in any practical sense, to an ordinary consumer simply because of the existence of a forum selection clause in the underlying contract." *Canteen*, 386 N.C. at 34, 900 S.E.2d at 902 (Riggs, J. dissenting). Thus, it is not within the universe of terms a reasonable consumer would have understood could be unilaterally added. *Id.*

SCFCU's additional arguments regarding unilateral modification are also not persuasive. First, SCFCU's brief relies on three cases that have no application whatsoever because they each rely on a Delaware statute that expressly permits credit card companies to add arbitration clauses to Delaware cardmember agreements by notice alone, regardless of whether that topic was an existing term.

See Ward v. Discover Bank, No. 3:19-CV-02124-SAL, 2020 WL 1922908, at *5 (D.S.C. Apr. 21, 2020) (citing Del. Code Ann. tit. 5, § 952(a) and noting that "in Delaware, the amendments at issue are expressly permitted by statute"); *Marsh*, 103 F. Supp. 2d at 918 (same citing Del. Code Ann. tit. 5, § 952(a)); *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574 (W.D.N.C. 2000) (same applying Delaware law to credit card agreement). These cases are inapplicable because South Carolina has no such statute. Indeed, the fact that Delaware passed such a statute implies that, absent a statute that specifically authorizes that conduct, such a unilateral addition would *not* be enforceable at common law.

Second, SCFCU's reliance on *Goetsch* actually proves Ms. Page's point. In *Goetsch* the plaintiff *conceded* he was bound by an original contract that included an arbitration clause. He simply objected to *changes* that the defendant made to that existing arbitration clause. *Id.* The court found that the *changes* to the *existing arbitration clause* were permitted by the change-of-terms clause but expressly distinguished this fact pattern from circumstances where, like here, an arbitration clause was later "added" as a new term. *Sears*, 593 S.E.2d at 430 n.2 (noting *Goetsch* expressly distinguished itself from a situation where a new arbitration clause was added where one had never existed before)

Third, SCFCU's reliance on *Fleming v. Borden, Inc.*, 316 S.C. 452, 450 S.E.2d 589 (1994), is misplaced for two reasons. To start, *Fleming* involved modification of a "*unilateral* contract." *Id.* at 461, 450 S.E.2d at 594 (emphasis added). But in *Lampo*, the South Carolina Supreme Court recently held that "an agreement to arbitrate is—

by definition—a *bilateral* contract." Op. No. 28265 (Davis Adv. Sh. No. 10 at 23) (emphasis added). And, as the South Carolina Supreme Court previously explained, "[w]e cannot find anything in *Fleming* or elsewhere that allows a party to alter the terms of a bilateral contract by unilateral modification." *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 405–06, 581 S.E.2d 161, 166 (2003). In addition, *Fleming* recognized that even in the unilateral contract context (not present here) there must be reasonable notice of any modification and that "the reasonable notice requirement for modification requires *actual* notice." *Fleming*, 316 S.C. at 463, 450 S.E.2d at 596 (emphasis added). There is no evidence of actual notice here.

Fourth, SCFCU's arguments regarding unilateral modifications run contrary to South Carolina law that "one party to a contract may not unilaterally alter its terms." *Lee v. Univ. of S.C.*, 407 S.C. 512, 518, 757 S.E.2d 394, 398 (2014) (quoting 17A Am.Jur.2d Contracts § 507). "Indeed, '[o]nce [a] bargain is formed, and the obligations set, a contract may only be altered by mutual agreement and for further consideration.'" *Id.* (quoting *Layman v. State*, 368 S.C. 631, 640, 630 S.E.2d 265, 269 (2006)).

This was strongly reaffirmed in *Lampo*, where the Court held that *no valid agreement to arbitrate* was formed when the defendant attempted to unilaterally add an arbitration clause to an existing agreement by providing actual notice and requiring that the plaintiff opt-out or be bound. Op. No. 28265 (Davis Adv. Sh. No. 10 at p. 31). The Court worried that if it allowed such unilateral behavior to form contracts, there would be no end to unilateral additions, which could harm consumers

and degrade the freedom of contract. *Id.* Moreover, a simple rule requiring businesses to obtain some modicum of actual assent to new terms is not onerous, as there are numerous ways in the modern world of doing so. And regulatory changes can be made as required because contracts already impliedly include all laws and, therefore, can be changed. *See generally Parker v. Byrd*, 309 S.C. 189, 193, 420 S.E.2d 850, 852 (1992) ("Every contract entered into in this State embodies in its terms all applicable laws of the State just as completely as if the contract expressly so stipulated." (quoting *Inabinet v. Royal Exchange Assur. of London*, 165 S.C. 33, 36, 162 S.E. 599, 600 (1932))).

Thus, in addition to failing to give notice required to form an agreement, the arbitration and class action waiver were not terms that could be unilaterally added under the "change of terms" provision. This Court should affirm.

C. SCFCU's equitable estoppel argument was both waived and is inapplicable.

SCFCU argues that estoppel applies to require arbitration. That argument is both waived and wrong.

SCFCU could have raised estoppel when it moved to compel, but instead it waited until its motion to reconsider to assert that Ms. Page should be estopped from avoiding arbitration. Therefore, SCFCU waived and failed to preserve any argument for estoppel because "[a]n issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009).

Waiver notwithstanding, the trial court did not err in declining to apply estoppel where SCFCU—the party asserting it—did not meet its "burden of establishing all its elements." *Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008). "In its broadest sense, equitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with his or her prior conduct." *Mac Papers, Inc. v. Genesis Press, Inc.*, 426 S.C. 393, 403, 826 S.E.2d 874, 880 (Ct. App. 2019). The doctrine examines the conduct of both "the estopped party and the party claiming estoppel":

> Elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. Essential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position.

Id. (quoting *Regions Bank v. Schmauch*, 354 S.C. 648, 674–75, 582 S.E.2d 432, 446 (Ct. App. 2003)); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001) (same). "Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other." *Mac Papers, Inc.*, 426 S.C. at 404, 826 S.E.2d at 880 (quoting *Evins v. Richland Cty. Historic Pres. Comm'n*, 341 S.C. 15, 20, 532 S.E.2d 876, 878 (2000)). "[R]eliance by the party seeking to assert estoppel must be reasonable." *Id.* (alteration in original) (quoting *S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth.*, 311 S.C. 29, 34, 426 S.E.2d 748, 751 (1993)). "Equitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly." *Wilson v. Willis*, 426 S.C. 326, 345, 827 S.E.2d 167, 177 (2019).

Here, SCFCU did not meet its burden to prove all the elements, and it would not have been equitable to estop Ms. Page under the circumstances. There is no dispute that the two documents Ms. Page attached to her complaint relating to breach do not contain any arbitration clause. And there is no proof that the supposed contract containing the arbitration clause (which SCFCU never sent Ms. Page) incorporates those documents, particularly where none of the dates match or specifically reference one another. Moreover, there is simply no evidence that SCFCU detrimentally relied on anything that Ms. Page did, to its prejudice and without the ability to know the true facts. SCFCU never sent Ms. Page the arbitration and class action waiver so it cannot show it would be justified in relying on such terms. Thus, the trial court correctly declined to apply estoppel because (in addition to SCFCU's waiver of this issue) the facts did not present the type of exceptional circumstances for which the doctrine should be used.

D. The trial court correctly held that SCFCU waived the right to enforce any arbitration agreement by never registering with the required arbitration provider and continuing to sue in court—conclusions that SCFCU does not challenge on appeal.

Finally, even if SCFCU had proven an agreement to arbitrate was formed (and it did not), and regardless of any estoppel arguments, the trial court gave an additional, independent reason for denying SCFCU's motion to compel: SCFCU was in default on and waived any arbitration agreement because it never registered the clause with the AAA (it still hasn't) and continued to sue in court despite the clause purportedly being mandatory. SCFCU *does not challenge this holding on appeal*. Its opening brief does not address this independent basis at all, and "a party cannot raise

an issue for the first time in an appellate reply brief." *ABB, Inc. v. Integrated Recycling Grp. of SC, LLC*, 432 S.C. 545, 553, 854 S.E.2d 171, 175 (Ct. App. 2021). It is well established that a point "not argued in the brief is deemed abandoned and will not be considered by the appellate court," and that "an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001); *see also Matter of Est. of Combis*, 439 S.C. 485, 496, 888 S.E.2d 1, 7 (Ct. App. 2023), *reh'g denied* (June 22, 2023) (citing *Spivey ex rel. Spivey v. Carolina Crawler*, 367 S.C. 154, 161, 624 S.E.2d 435, 438 (Ct. App. 2005) (declining to consider issues raised for the first time in the appellants' reply brief when not raised in the appellant's initial brief)). This Court could therefore jump straight to this basis for the trial court's ruling and affirm because SCFCU has abandoned any argument that the trial court was wrong on this point. *See Glasscock, Inc.*, 348 S.C. at 81, 557 S.E.2d at 691.

SCFCU's abandonment notwithstanding, the trial court was correct. SCFCU's arbitration clause requires arbitration before the AAA, but SCFCU is in default in proceeding with any arbitration because it has not registered its clause, nor has the clause been approved by the AAA. *See* R-12 of AAA's Consumer Arbitration Rules, https://adr.org/sites/default/files/Consumer%20Rules.pdf (last visited Apr. 7, 2025). This is evident from a simple search of the AAA's registry, which shows that South Carolina Federal Credit Union is not listed—even as of the filing of this brief. This

search is publicly available.[5] This means that SCFCU has *never* actually arbitrated against any customer because the 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 the 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 the AAA declined arbitration). Thus, SCFCU, despite an arbitration clause that it argues now *requires* arbitration of all disputes, *has never actually used* arbitration but has proceeded in court, just as Ms. Page seeks to do here. *See Merritt Island Woodwerx LLC,* 2023 WL 8699470, at *8 (party waives right to arbitration by acts inconsistent with that right). Indeed, a search of the Marion County Twelfth Judicial Circuit Public Index showed that SCFCU is listed as a plaintiff in numerous cases in that circuit court. (Resp. at p. 9.) "[A] court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records." *S.C. Dep't of Soc. Servs. v. Janice C.*, 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009) (citation omitted). Thus, SCFCU's actions show that it waived any right to invoke mandatory arbitration and that there was no actual meeting of the minds to arbitrate between SCFCU and customers

[5] The AAA's consumer clause registry can be searched at this web address: https://apps.adr.org/ClauseRegistryUI/faces/org/adr/extapps/clauseregistry/view/pages/clauseRegistry.jsf

because SCFCU continues to use the courts, not arbitration. This Court should affirm.

CONCLUSION

For the foregoing reasons, the Court should affirm the order below.

Respectfully submitted,

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