IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Lataveia Allen, on behalf of herself and all others similarly situated, Plaintiff, v. SRP Federal Credit Union, Defendant.	Case No. 1:24-cv-07476-CMC
Norman Black, on behalf of himself and all others similarly situated, Plaintiff, v. SRP Federal Credit Union, Defendant.	Case No. 1:24-cv-07519-CMC
Ge-Quoia Whitfield, on behalf of herself and all others similarly situated, Plaintiff, v. SRP Federal Credit Union, Defendant.	Case No. 1:24-cv-07537-CMC

Rosemary Ortiz, on behalf of herself and all others similarly situated, Plaintiff, v. SRP Federal Credit Union, Defendant.	Case No. 1:24-cv-07671-CMC
Theresa McGrier, on behalf of herself and all others similarly situated, Plaintiff, v. SRP Federal Credit Union, Defendant.	Case No. 1:24-cv-07695-CMC
Shannon Dunn, on behalf of herself and all others similarly situated, Plaintiff, v. SRP Federal Credit Union, Defendant.	Case No. 1:25-cv-00210-CMC

Ricky Chase, on behalf of himself and all others similarly situated, Plaintiff, v. SRP Federal Credit Union, Defendant.	Case No. 1:25-cv-00312-CMC

ORDER DENYING DEFENDANT'S MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1) AND CERTIFYING QUESTIONS TO THE SUPREME COURT OF SOUTH CAROLINA

Plaintiffs in these consolidated actions are seven members of SRP Federal Credit Union ("SRP") whose personally identifiable information ("PII") was compromised in a 2024 data breach. The court previously dismissed Plaintiffs' original consolidated complaint without prejudice for lack of standing, finding no Plaintiff had plausibly alleged an injury in fact fairly traceable to SRP's challenged conduct. The court granted leave to amend, and Plaintiffs timely filed an amended consolidated complaint ("Amended Complaint"). SRP now moves again to dismiss on standing grounds. It also moves in the alternative to compel arbitration of Plaintiffs' claims under 9 U.S.C. § 4 or to dismiss them for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

With the benefit of the Fourth Circuit's decision in *Holmes v. Elephant Insurance Co.*, 156 F.4th 413 (4th Cir. 2025), the court has little trouble concluding all seven Plaintiffs have standing to seek damages based on the disclosure of their PII on the dark web. SRP's motion to compel

arbitration, meanwhile, presents unsettled issues of South Carolina law concerning the formation of consumer contracts. Because these issues are important to consumers and businesses alike and are likely to recur in future cases, the court believes the Supreme Court of South Carolina should have the opportunity to decide them in the first instance. For these reasons, the court respectfully certifies the following questions to that court pursuant to South Carolina Appellate Court Rule 244:

> (1) Does a consumer who agreed to be bound by an agreement "as amended from time to time" when opening an account manifest assent to a proposed modification adding an arbitration provision by failing to opt out within the time provided and continuing to use the account?
>
> (2) When a modification clause allows one party, "in its sole discretion," to change any contract term "at any time without notice except as expressly required by applicable law," does the implied covenant of good faith and fair dealing apply to limit the party's discretion and save the agreement from illusoriness?

I. BACKGROUND

A. The Parties and SRP's Membership Agreement

SRP is a federally chartered credit union serving more than 195,000 members in Georgia and South Carolina. Dkt. No. 52 ¶ 21.[1] The seven Plaintiffs joined SRP at various times over the past three decades: Black became a member in March 1996; McGrier in April 2008; Ortiz in June 2014; Whitfield in August 2015; Chase in August 2019; Dunn in December 2019; and Allen in June 2022. Dkt. No. 53-10 ¶¶ 20–26.

[1] Citations to docket entries refer to those in the lead case, No. 1:24-cv-07476-CMC.

To open an account with SRP, a prospective member must complete and sign a membership application. *Id.* ¶ 7. Since 2014, the application has included the following language:

> I . . . acknowledge that I have received and agree to be bound by any terms and conditions in this card, and in the Membership Agreement, Truth-in-Savings Act Rate and Fee Schedule, and any Special Account or other separate Account Service Applications or Agreements as amended from time to time, which are incorporated herein by reference.

Id. ¶ 8.

In June 2021, SRP sent a change-in-terms notice to members with active accounts, informing them that updates to the Membership Agreement, including a "new" arbitration provision, would take effect on August 1, 2021 ("2021 Membership Agreement").[2] Dkt. No. 53-2 at 2. The bottom of the one-page notice informed members they had until September 15, 2021, to opt out of the arbitration provision and stated that continued use of an account after that date would constitute assent to its terms. *Id.* It also directed members to visit SRP's website to obtain an electronic copy of the 2021 Membership Agreement or a local branch to request a paper copy. *Id.*

As relevant here, the 2021 Membership Agreement contains a clause that allows SRP to unilaterally modify any term of the agreement at its "sole discretion":

> The Credit Union, in its sole discretion, may change any term or condition of this Agreement, including the method for determining dividends, at any time without notice except as expressly required by applicable law. If applicable laws provide no express time period, then notice ten (10) days or more in advance of the effective date of any change shall be deemed sufficient.

---

[2] SRP sent the 2021 notice to all Plaintiffs except Allen, who had not yet opened an account. Dkt. No. 53-10 ¶ 16.

Dkt. No. 53-3 at 18.

Additionally, the 2021 Membership Agreement explains the procedure for opting out of the arbitration provision:

> RIGHT TO OPT OUT. You may opt-out of this Arbitration Provision by calling us toll free at: 1-800-237-9829, or by sending us a written notice which includes your name(s), account number(s), and a statement that you (both or all of you, if more than one) do not wish to be governed by the Arbitration Provision in your Account Agreement (the "Opt-Out Notice").
>
> To be effective, your written Opt-Out Notice must be: (1) sent to us by first class mail or certified mail, return receipt requested, at: SRP Federal Credit Union, Attn. Deposit Services, P.O. Box 6730, North Augusta, S.C. 29861-6730, and (2) signed by you (or all of you, if more than one party to any relationship) including the information set forth above. We must receive your telephone call or written notice within forty-five (45) days after either: (i) the date this Arbitration Provision was first delivered or otherwise made available to you, in paper or electronic form, or (ii) the day you open your account, whichever is later.

Id. at 23.

In July 2023, SRP sent members another change-in-terms notice announcing further updates to the Membership Agreement, effective August 1, 2023 ("2023 Membership Agreement").[3] Dkt. No. 53-4 at 2. Unlike the 2021 notice, the 2023 notice did not mention the right to opt out of the arbitration provision, though it similarly directed members to visit SRP's website or a branch to obtain a copy of the updated agreement. *Id.* The 2023 Membership Agreement itself contains the same opt-out clause as its predecessor. Dkt. No 53-1 at 24.

[3] SRP did not send the 2023 notice to Chase because he was no longer an active member. Dkt. No. 53-10 ¶ 18.

According to SRP's records, no Plaintiff opted out of the arbitration provision in either the 2021 or 2023 Membership Agreement.[4] Dkt. No. 53-10 ¶ 28.

B. The 2024 Data Breach

On December 12, 2024, SRP notified its members "of a recent incident that may have involved some of [their] personal information." Dkt. No. 52-1 at 2. SRP explained that "an unknown, unauthorized third party accessed [its] computer systems" between September 5, 2024, and November 4, 2024, and "potentially acquired certain files from [its] network during that time." *Id.* Members were informed that the "files potentially acquired by the third party" contained their names, dates of birth, Social Security numbers, and financial account numbers. Dkt. No. 52-2 at

---

[4] Both arbitration provisions provide in relevant part:

> Under the terms of this Arbitration Provision, and except as set forth below, Claims (as defined below) will be resolved by individual (and not class-wide) binding arbitration in accordance with the terms specified herein, if you or we elect it. These provisions shall apply to any claim arising or relating to any Claim existing now or in the future and shall apply to existing and future accounts.

Dkt. No. 53-1 at 22; 53-3 at 21. A "claim," in turn, is defined as

> any demand, cause of action, complaint, claim, asserted right, or request for monetary or equitable relief, whether past, present or future, and based upon any legal theory, including contract, tort, consumer protection law, fraud, statute, regulation, ordinance, or common law, which arises out of or relates to your Membership Agreement, your deposit account(s) or loan account(s), the events leading up to your becoming an account holder or borrower (for example, advertisements or promotions), any feature or service provided in connection with your account(s), or any transaction conducted with us related to any of your accounts or services.

Dkt. No. 53-1 at 23; 53-3 at 21–22.

2–5, 9–11. SRP assured those affected it had "no evidence that [their] personal information ha[d] been misused" but encouraged them to enroll in a complimentary one-year credit monitoring service and to "remain vigilant" against "potential fraud and/or identity theft." Dkt. No. 52-1 at 2, 5.

According to the Amended Complaint, the data breach was perpetrated by a ransomware group called Nitrogen. Dkt. No. 52 ¶ 39. Ransomware is a type of malicious software, or "malware," that encrypts a victim's data and prevents access until a ransom payment is made. *Id.* ¶ 46. Ransomware actors also frequently employ "double extortion" tactics in which they not only encrypt the victim's data but also steal it and threaten to publicly release or sell it if the ransom is not paid. *Id.* ¶¶ 47–48; *see also* Cybersecurity & Infrastructure Sec. Agency, *#StopRansomware Guide*, https://www.cisa.gov/stopransomware/ransomware-guide (last visited Mar. 18, 2026). "Once the data is exfiltrated from a network," the Amended Complaint asserts, "it should be assumed it will be traded to other threat actors, sold, or held for a second/future extortion attempt." Dkt. No. 52 ¶ 48 (citation modified).

True to the double-extortion model, Nitrogen allegedly stole at least 650 gigabytes of SRP customer data and published at least 471 megabytes of it on its dark web leak site. *Id.* ¶ 41. A screenshot in the Amended Complaint depicts Nitrogen's dark web listing for SRP, which advertises "Confidential customer data (Full names, SSN, DOB, Address, Account numbers, credit rating)" for sale for $400,000 and includes thumbnail images of what appear to be customer records posted as "proof of leakage." *Id.* ¶ 40. The Amended Complaint also specifically alleges that the PII of Allen, Whitfield, McGrier, Dunn, and Chase can be downloaded from the post. *Id.* ¶ 43.

The seven Plaintiffs allege various injuries resulting from the data breach. All seven assert that the breach increased their risk of identity theft, *id.* ¶¶ 84, 99, 114, 131, 146, 163, 176, diminished the value of their PII, *id.* ¶¶ 81, 96, 111, 126, 143, 158, 173, and led to an uptick in spam calls and text messages, *id.* ¶¶ 85, 100, 115, 132, 147, 159, 177. They also claim to have spent considerable time and effort mitigating the impact of the data breach, including conducting research, reviewing account statements, changing passwords, freezing their credit, and purchasing credit monitoring. *Id.* at ¶¶ 82, 97, 112, 129, 144, 161, 174. In addition to these harms, several Plaintiffs allege actual misuse of their PII. Dunn learned in February 2025 that "an unknown person [had] submitted a W-2 using her name and Social Security number."[5] *Id.* ¶ 77. McGrier has "suffered a number of fraudulent charges on her SRP account," forcing her to cancel her debit card and obtain a new one. *Id.* ¶ 97. Chase has "flagged multiple unauthorized charges on his accounts associated with SRP." *Id.* ¶ 112. And Black "ultimately clos[ed] his SRP account and open[ed] another due to various fraudulent charges," including an unauthorized $69.99 purchase in August 2025. *Id.* ¶¶ 128–29.

C. Procedural History

In December 2024 and January 2025, Allen, Black, Whitfield, Ortiz, McGrier, Dunn, and Chase each filed separate lawsuits against SRP. The court subsequently consolidated the cases under Federal Rule of Civil Procedure 42(a), and on April 7, 2025, Plaintiffs filed a consolidated class-action complaint ("Original Complaint"). Dkt. Nos. 14, 19. The Original Complaint asserted

[5] This allegation did not appear in the Original Complaint.

claims for negligence, negligence per se, breach of implied contract, violation of S.C. Code Ann. § 39-1-90, breach of confidentiality, breach of fiduciary duty, unjust enrichment, and recovery of litigation expenses under Ga. Code Ann. § 13-6-11. Dkt. No. 19 ¶¶ 198–289. It also sought to certify a class "of at least 240,000 former and current [SRP] customers . . . whose data was compromised in the [d]ata [b]reach." *Id.* ¶¶ 185–97.

On October 9, 2025, the court dismissed the Original Complaint without prejudice for lack of standing, holding that none of the seven Plaintiffs had plausibly alleged an injury in fact traceable to the SRP breach. Dkt. No. 51. The court found that three Plaintiffs — McGrier, Chase, and Black — had alleged an injury in fact based on unauthorized charges to their SRP accounts. *Id.* at 9. But the court ultimately dismissed their claims for failure to adequately allege traceability. *Id.* at 18–22. The Original Complaint did not specify when the fraudulent charges occurred relative to the breach, and it lacked sufficient detail to connect the type of information disclosed in the breach to the type of information that would have been needed to carry out the alleged fraud. *Id.* at 21–22.

The court held that the four remaining Plaintiffs — Dunn, Allen, Whitfield, and Ortiz — failed to establish Article III standing under any of their theories. Their risk of future identity theft was too speculative to confer standing, the court concluded, because it depended on an "attenuated chain of possibilities" involving the independent decisions of third parties. *Id.* at 9–13 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)). And because that risk was insufficiently imminent, the time and money they spent mitigating the effects of the breach could not support standing either. *Id.* at 13–14. The court further held that (1) their "invasion of privacy" theory

failed because they had not identified a specific common-law analogue for their asserted injury; (2) their attempt to establish standing based on "feelings of anxiety, stress, fear, and frustration" was foreclosed by *Beck v. McDonald*, 848 F.3d 262, 272–73 (4th Cir. 2017); (3) their diminished-value-of-PII theory failed because they had not alleged they ever intended to sell their PII or that such information was now worth less; and (4) an alleged increase in spam communications neither constituted a concrete injury nor could be traced to the breach. *Id.* at 14–18. Finally, the court held that all seven Plaintiffs lacked standing to pursue injunctive relief against SRP. *Id.* at 22–24.

The court granted Plaintiffs leave to amend to cure the standing deficiencies, and on November 7, 2025, Plaintiffs filed the operative Amended Complaint. Dkt. No. 52. The Amended Complaint asserts the same claims as the Original Complaint and likewise seeks to certify a class of all current and former SRP members affected by the breach. *Id.* ¶¶ 201–13, 214–305.

On November 21, 2025, SRP filed a renewed motion to compel arbitration or, in the alternative, to dismiss for lack of standing under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). Dkt. No. 53. Plaintiffs responded in opposition on January 9, 2026, and SRP filed a reply on January 26, 2026. Dkt. Nos. 58, 59. SRP's motion is fully briefed and ripe for resolution.

II. LEGAL STANDARDS

A. Rule 12(b)(1)

A motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) "addresses whether [the plaintiff] has a right to be in the district court at all and whether the court has the power to hear and dispose of [its] claim." *Holloway v. Pagan River Dockside Seafood, Inc.*, 669

F.3d 448, 452 (4th Cir. 2012). "Challenges to subject-matter jurisdiction can be presented either facially or factually." *Hutton v. Nat'l Bd. of Exam'rs in Optometry, Inc.*, 892 F.3d 613, 620 (4th Cir. 2020). A facial challenge argues the complaint "fails to allege facts upon which subject matter jurisdiction can be based," while a factual challenge contends "the jurisdictional allegations of the complaint [are] not true." *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) (quoting *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). When, as here, a defendant raises a facial challenge, the plaintiff "is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Adams*, 697 F.2d at 1219. That is, "the facts alleged in the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Kerns*, 585 U.S. at 192.

B. Motions to Compel Arbitration

The Federal Arbitration Act ("FAA") authorizes "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition [a] United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. In ruling on a motion to compel arbitration, a court considers two questions: (1) whether "an arbitration agreement exists between the parties," and (2) whether "the dispute at issue falls within the scope of [that] agreement." *Hightower v. GMRI, Inc.*, 272 F.3d 239, 242 (4th Cir. 2001). If both questions are answered affirmatively, the court has "no choice but to grant [the] motion." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002); *see also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) ("By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district

courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." (emphasis in original)).

When determining whether parties agreed to arbitrate, the court "employ[s] the summary judgment standard as a gatekeeper." *Rowland v. Sandy Morris Fin. & Est. Planning Servs., LLC*, 993 F.3d 253, 258 (4th Cir. 2021). The court "consider[s] all relevant, admissible evidence submitted by the parties" and "draw[s] all reasonable inferences in favor of the non-moving party." *Nicosia v. Amazon, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016) (internal quotation marks omitted). If the record reveals a genuine dispute of material fact "regarding the existence of an agreement to arbitrate," *Chorley Enters., Inc. v. Dickey's Barbecue Rests., Inc.*, 807 F.3d 553, 564 (4th Cir. 2015), "the 'court shall proceed summarily' and conduct a trial on the motion to compel arbitration," *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 234 (4th Cir. 2019) (quoting 9 U.S.C. § 4). But the court may resolve the motion "without proceeding to a § 4 trial" if it can determine "as a matter of law that the parties did or did not agree to arbitrate." *Jin v. Parsons Corp.*, 966 F.3d 821, 827 (D.C. Cir. 2020); *see also Rowland*, 993 F.3d at 258–59; *Chorley Enters.*, 807 F.3d at 564.

III. DISCUSSION

A. Standing

The court begins, as it must, with whether the named Plaintiffs have standing to proceed in federal court. Article III of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. A necessary component of the case-or-controversy limitation is that a plaintiff must have "a 'personal stake' in the case — in other words,

standing." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)). "To establish standing, a plaintiff must show an injury in fact caused by the defendant and redressable by a court order." *United States v. Texas*, 599 U.S. 670, 676 (2023). This case concerns standing's "foremost" element: injury in fact. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

To establish injury in fact, a plaintiff must show an "invasion of a legally protected interest" that is "concrete," "particularized," and "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). A "concrete" injury is one that "actually exist[s]"; in other words, it is "real, and not abstract." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016) (internal quotation marks omitted). The "most obvious" kind of concrete injuries are "traditional tangible harms, such as physical harms and monetary harms." *TransUnion*, 594 U.S. at 425. But "intangible harms" may also qualify, provided they bear "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *Id.* The second component — "particularity" — requires that "the injury must affect 'the plaintiff in a personal and individual way' and not be a generalized grievance." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024) (quoting *Lujan*, 504 U.S. at 560 n.1)). Finally, an injury is "actual or imminent" if the harm has "already occurred or [is] likely to occur soon." *Id.* Allegations of future harm may suffice, but only if "the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper*, 568 U.S. at 409, 414 n.5).

The Supreme Court has emphasized that "[s]tanding is not dispensed in gross." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). A plaintiff must instead "demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). Thus, that a plaintiff has standing to pursue one type of relief does not necessarily mean she has standing to pursue another. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

These requirements "apply with no less force in the context of class actions." *Fernandez v. RentGrow, Inc.*, 116 F.4th 288, 295 (4th Cir. 2024). Indeed, federal courts lack "the power to order relief to any uninjured plaintiff, class action or not." *TransUnion*, 594 U.S. at 431 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C. J., concurring)). "So, like any other plaintiffs, [Allen, Black, Whitfield, Ortiz, McGrier, Dunn, and Chase] can each only proceed if they show an injury-in-fact caused by [SRP] and redressable by the court for each form of relief sought." *Holmes*, 156 F.4th at 420.

With the above standing principles in mind, the court concludes each named Plaintiff has standing to seek monetary damages, but not injunctive relief. As *Holmes* makes clear, having one's sensitive personal information posted to the dark web is sufficiently analogous to the harm inflicted by the tort of public disclosure of private facts to confer standing for damages. 156 F.4th at 423–26. But because the Amended Complaint contains no allegations suggesting Plaintiffs face an imminent risk of having their PII exposed in another breach, they lack standing to pursue an injunction against SRP.

1. Standing for Damages

Less than a week after the court issued its order dismissing the Original Complaint, the Fourth Circuit decided *Holmes*. There, four plaintiffs brought a putative class action after hackers breached the defendant's network and stole the driver's license numbers of nearly 3 million people. *Holmes*, 156 F.4th at 419. Two of those plaintiffs — Jaime Cardenas and Christopher Holmes — specifically alleged their driver's license numbers had been posted on the dark web following the breach. *Id.* at 419–20.

To establish standing, the plaintiffs sought to analogize the harm from the data breach to the harm associated with the tort of public disclosure of private facts. *Id.* at 423; *see also TransUnion*, 594 U.S. at 424 (requiring plaintiffs to "identif[y] a close historical or common-law analogue for their asserted injury"). That tort, the Fourth Circuit explained, addresses the harm that occurs "when information that the plaintiff would justifiably prefer to tightly control is released into the open." *Holmes*, 156 F.4th at 425.

Writing for the court, Judge Richardson identified two features that define this harm. First, "[t]hough the information need not be embarrassing or salacious, the plaintiff must have good reason to keep it close to the vest." *Id.* The public-disclosure tort is "chiefly concerned" with the dissemination of information about "'[s]exual relations,' 'family quarrels,' and 'humiliating illnesses.'" *Id.* at 423 (quoting Restatement (Second) of Torts § 652D cmt. b (A.L.I. 1965)). But it also "protects some types of information that we would not strictly consider embarrassing," like "'income tax returns.'" *Id.* at 427 (quoting Restatement (Second) of Torts § 652D cmt. b). Second, the disclosure must be broad enough that the information "reaches, or is sure to reach, the public."

Id. at 424 (quoting Restatement (Second) of Torts § 652D cmt. a). "Publicity is given," for example, "to information 'broadcast over the radio,' or given 'to a large audience,' or published 'in a newspaper or a magazine, even of small circulation,' but not to statements made 'to a small group of persons.'" *Id.* (quoting Restatement (Second) of Torts § 652D cmt. a).

Applying these principles, the court held that the harm asserted by Cardenas and Holmes was sufficiently analogous to that addressed by the public-disclosure tort to constitute a concrete injury. The plaintiffs had a "justifiabl[e]" reason "to keep their driver's license numbers confidential": driver's license numbers can be used "alone or in combination with other information" to "[o]pen bank accounts" and "[a]pply for financial loans" and are often "the critical missing link for a fraudulent unemployment benefits application." *Id.* at 425. And because their numbers had been posted on the dark web — "a forum accessible to all — or at least to those with some degree of proficiency with computers" — their information had been "released into the open." *Id.* at 426. The Fourth Circuit thus concluded Cardenas and Holmes had suffered a concrete injury sufficient to confer standing for damages.

The same conclusion is warranted here. The PII exposed in the SRP data breach — names, dates of birth, and Social Security numbers — is among the most sensitive information a person possesses. "[A social security number], along with a person's name and birth date, authenticates an individual in the marketplace." Danielle Keats Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age,* 80 S. Cal. L. Rev. 241, 252 (2007). An identity thief armed with this combination "obtains 'virtual keys' to a victim's finances" and "can empty bank accounts, obtain credit cards, secure loans, open lines of credit, connect telephone

services, and enroll in government benefits in a victim's name." *Id.* Plaintiffs therefore plainly have "good reason to keep [this information] close to the vest" and "would justifiably prefer to tightly control" it. *Holmes*, 156 F.4th at 425.

The seven named Plaintiffs have also plausibly alleged their PII has been "released into the open." *Id.* The Amended Complaint includes a screenshot of Nitrogen's dark web site, which identifies SRP as a victim and advertises "Confidential customer data (Full names, SSN, DOB, Address, Account numbers, credit rating)" for sale for $400,000. Dkt. No. 52 ¶ 40. The screenshot also contains thumbnail images of what appears to be customer information as "proof of leakage." *Id.* Five of the named Plaintiffs — Allen, Whitfield, McGrier, Dunn, and Chase — allege their PII can be found in a download available on the page, meaning their information is now accessible to anyone who can navigate the dark web. *Id.* ¶ 43. And although Black and Ortiz allege only "on information and belief" that their PII is among the information listed for sale, the allegation is supported by sufficient factual matter to make it plausible. *See Lowy v. Daniel Defense, LLC*, 167 F.4th 175, 199 (4th Cir. 2026) (noting that on-information-and-belief allegations are permissible "where the belief is based on sufficient factual material that makes the inference of culpability plausible" (internal quotation marks omitted)). The Amended Complaint alleges Nitrogen published on its leak site less than one percent of the 650 gigabytes of data it stole.[6] Dkt. No. 52

[6] For reference, one gigabyte can hold around 65,000 Microsoft Word pages or 100,000 pages of emails. *See* Hon. Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. Rev. 495, 512 (2013).

¶ 41. If the PII of five of the seven named Plaintiffs appears in that sliver, it is more than plausible that Black's and Ortiz's information is in the remaining 99 percent.[7]

Curiously, SRP does not once mention *Holmes* in its motion or reply brief. It does, however, argue the public-disclosure tort cannot serve as an analogue for Plaintiffs' asserted harm because third-party hackers were the ones who disclosed Plaintiffs' PII. Dkt. No. 53 at 21. The Fourth Circuit considered and rejected an identical argument in *Holmes*:

> A defendant's disclosure, though also *an* element of the public disclosure of private information tort, is not a *harm-defining* element — it goes to the defendant's liability, not to what is felt by the plaintiff. Someone whose [sensitive personal information] is made accessible to many is harmed by that loss of control over [that] information, even if the situation was brought about through no fault or action of the defendant.

156 F.4th at 426 (emphasis in original). So SRP's role in Plaintiffs' PII ending up on the dark web has no bearing on whether Plaintiffs suffered a concrete injury.

In the end, Allen, Black, Whitfield, Ortiz, McGrier, Dunn, and Chase have all alleged facts "showing that information they justifiably prefer to tightly control has been released into the open."

[7] That Black's and Ortiz's PII may be accessible only with payment does not mean it has not been "given publicity." Newspapers require payment too, yet "listing information in a newspaper" is a "classic example of publicity in public-disclosure tort cases." *Holmes*, 156 F.4th at 426 n.10; *see also id.* ("Paywalled or not, information listed on the internet is ordinarily accessible to many.").

Id. Accordingly, each has adequately pled a concrete injury in fact sufficient to confer standing for damages.[8]

2. Standing for Injunctive Relief

Although Plaintiffs have standing to seek damages from SRP, they lack standing to pursue their requested injunctive relief.

The Amended Complaint first seeks an injunction requiring SRP to "strengthen its data security systems and monitoring procedures" and to "conduct periodic audits of those systems."[9] Dkt. No. 52 ¶¶ 234, 247. Such an injunction "cannot protect [Plaintiffs] from future misuse of their PII by the individuals they allege now possess it" — it instead "would safeguard only against a future breach." *Webb v. Injured Workers Pharm., LLC*, 72 F.4th 365, 378 (1st Cir. 2023).

Plaintiffs, however, offer no allegations to suggest the risk of their PII being compromised in a future data breach involving SRP's systems is "sufficiently imminent and substantial." *TransUnion*, 594 U.S. at 435. In particular, they offer no reason to believe hackers will target SRP again rather than any of the countless other organizations that have suffered data breaches in recent

[8] Given this conclusion, the court need not consider whether Plaintiffs' other asserted injuries support standing for damages. *See Holmes*, 156 F.4th at 433 ("[T]here is no such thing as double standing for one form of relief.").

[9] Paragraphs 234 and 247 also request that the court order SRP to provide Plaintiffs with "lifetime credit monitoring and identity theft insurance." Dkt. No. 52 ¶¶ 234, 237. But because this relief would entail no "more than an exchange of money," it cannot be considered "injunctive in nature." *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1404 (W.D. Mo. 1994); *see also Barraza v. C.R. Bard Inc.*, 322 F.R.D. 369, 387 (D. Ariz. 2017) ("[A] remedy requiring Defendants to do nothing more than write a check can[not] properly be viewed as an injunction.").

years. *See Holmes*, 156 F.4th at 433. Nor do the seven named Plaintiffs give any reason to think another breach at SRP would compromise *their* information specifically, as opposed to that of any of SRP's 240,000 other current and former members. *See id.* "The most that can be reasonably inferred from [Plaintiffs'] allegations . . . is that [they] *could* be victimized by a future data breach. That alone is not enough." *Beck*, 848 F.3d at 277–78 (emphasis in original); *see also Lyons*, 461 U.S. at 105–08 (holding that a plaintiff who had been placed in a chokehold by law enforcement lacked standing to seek an injunction barring the future use of the technique).

Plaintiffs also request the court "[e]njoin[] [SRP] from further deceptive practices and making untrue statements about the [d]ata [b]reach and the stolen PII." Dkt. No. 52, Prayer for Relief. "But nowhere do [Plaintiffs] allege that [SRP] is likely to make deceptive statements about that past breach in the future or that any such statements would harm [them], particularly now that they know about the breach." *Webb*, 72 F.4th at 378. Thus, this "requested injunction would have no chance of redressing any alleged injury, and [Plaintiffs] lack standing to pursue it." *Id.*

* * *

Each named Plaintiff has standing to sue for damages, but not an injunction. Satisfied that Plaintiffs' suit presents a justiciable case or controversy, the court next turns to the merits of SRP's motion to compel arbitration.

B. SRP's Motion to Compel Arbitration

SRP moves to compel arbitration of Plaintiffs' claims based on the arbitration provision in the 2021 and 2023 Membership Agreements. SRP contends Plaintiffs are required to arbitrate because they agreed to be bound by the Membership Agreement "as amended from time to time"

when opening their accounts, were notified of their right to opt out of the arbitration provision, and failed to do so. Dkt. No. 53 at 10–11. It further contends that Plaintiffs' claims fall within the scope of the arbitration provision because all claims relate to Plaintiffs' accounts and membership in the credit union. *Id.* at 12–13.

In resisting arbitration, Plaintiffs make two arguments. First, they argue they did not receive reasonable notice of the arbitration provision and never assented to its terms. Dkt. No. 58 at 9–13. Second, they argue the arbitration provision is illusory due to the unilateral modification clause in the 2021 Membership Agreement, which allows SRP, "in its sole discretion," to "change any term or condition of [the] Agreement . . . at any time without notice except as expressly required by applicable law."[10] *Id.* at 13–15; *see* Dkt. No. 53-3 at 18. The court addresses each argument in turn.

1. Notice and Assent

"[A]rbitration is strictly a matter of consent," *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 184 (2019) (internal quotation marks omitted), and "disputes are subject to arbitration if, and only if, the parties actually agreed to arbitrate those disputes," *Coinbase, Inc. v. Suski*, 602 U.S. 143, 145 (2024). SRP, as the party seeking to compel arbitration, bears the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence. *Austin v. Experian Info. Sols., Inc.*, 148 F.4th 194, 206 (4th Cir. 2025).

[10] The 2023 Membership Agreement also contains a modification clause, *see* Dkt. No. 53-1 at 19, but the parties address only the one in the 2021 version.

"Whether an agreement to arbitrate was formed is a question of ordinary state-law principles that govern the formation of contracts." *Rowland*, 993 F.3d at 257 (internal quotation marks omitted). Under South Carolina law,[11] SRP "must show (1) that [each Plaintiff] had reasonable notice of an offer to enter into an arbitration agreement, and (2) that [each Plaintiff] manifested [his or her] assent to that agreement." *Marshall v. Georgetown Mem'l Hosp.*, 112 F.4th 211, 218 (4th Cir. 2024).

Of the seven Plaintiffs, Allen's circumstances present the most straightforward analysis. She became a member of SRP in June 2022, after the arbitration provision had already been added to the 2021 Membership Agreement. As a condition of opening her account, she

> [a]cknowledge[d] that [she] [had] received and agree[d] to be bound by any terms and conditions . . . *in the Membership Agreement*, Truth-in-Savings Act Rate and Fee Schedule, and any Special Account or other separate Account Service Applications or Agreements as amended from time to time, *which are incorporated herein by reference*.

Dkt. No. 53-9 at 2 (emphasis added). "It is undisputed that one contract may incorporate another by reference." *Shaw v. E. Coast Builders of Columbia, Inc.*, 354 S.E.2d 392, 392 (S.C. 1987) (citing *Twiggs v. Williams*, 82 S.E. 676 (1914)). So by signing the application, Allen manifested her assent to the incorporated 2021 Membership Agreement — and its arbitration provision. *See Lampo v. Amedisys Holding, LLC*, 914 S.E.2d 139, 143 (S.C. 2025) ("The typical action an offeree

[11] The parties rely on South Carolina contract law, so the court does the same. *See* Dkt. Nos. 53 at 10; 58 at 10; *see also Faulkenberg v. CB Tax Franchising Sys., LP*, 637 F.3d 801, 809 (7th Cir. 2011) (applying forum law to decide whether the parties formed an arbitration agreement in the absence of a choice-of-law dispute).

takes to accept an offer is to sign a writing that sets forth the offer, thereby clearly indicating a willingness and desire to form a contract."); *see also Regions Bank v. Schmauch*, 582 S.E.2d 432, 440 (S.C. Ct. App. 2003) ("A person signing a document is responsible for reading the document and making sure of its contents.").

The analysis is more complicated for Black, McGrier, Ortiz, Whitfield, Chase, and Dunn, all of whom joined SRP before the arbitration provision was added to the Membership Agreement in 2021. As explained below, the court finds these six Plaintiffs received sufficient notice of an offer to enter into an arbitration agreement. Whether they accepted that offer, however, presents an important and unsettled issue of South Carolina law that, in the court's view, warrants certification to the Supreme Court of South Carolina.

As for notice, SRP has presented a declaration from its Chief Technology Officer averring that SRP sent the 2021 notice to the email or mailing address on file for each member with an active account at the time. Dkt. No. 53-10 ¶¶ 16, 18. "It is well established that evidence of mailing a properly addressed letter gives rise to a presumption of receipt under South Carolina law." *Hughes v. Charter Comm'ns, Inc.*, C/A No. 3:19-cv-01703-SAL, 2020 WL 1025687, at *6 (D.S.C. Mar. 2, 2020) (applying the presumption to emails). "To overcome the presumption, the opposing party must submit evidence that the mailing [or emailing] was not actually accomplished or testimony affirmatively denying receipt." *Id.* Plaintiffs have failed to do so.

Black, McGrier, Ortiz, Whitfield, Chase, and Dunn each represent that, "[t]o the best of my knowledge and belief, SRP did not send me a copy of the membership agreement updated in 2021 . . . containing an arbitration provision." Dkt. Nos. 58-2 ¶ 9; 58-3 ¶ 9; 58-4 ¶ 9; 58-5 ¶ 9; 58-

6 ¶ 9; 58-7 ¶ 9. But this testimony is not an affirmative denial — it is qualified by the phrase "to the best of my knowledge and belief." *See Hughes*, 2020 WL 1025687, at *8 (testimony that the plaintiff did "not remember receiving or reviewing [an] email" did not constitute an affirmative denial). Moreover, it addresses the wrong issue. SRP does not claim to have sent members a copy of the Membership Agreement itself. Rather, it asserts that it sent a change-in-terms notice informing them of the arbitration provision and their right to opt out. Because no Plaintiff denies receiving *that document*, the presumption remains unrebutted, and the court finds no genuine dispute that Black, McGrier, Ortiz, Whitfield, Chase, and Dunn received the 2021 notice.

The court further finds "the design and content" of the 2021 notice reasonably notified them of "a contract on offer and its terms." *Austin*, 148 F.4th at 206 (internal quotation marks omitted). The notice itself is a single page. It begins with the heading "IMPORTANT INFORMATION REGARDING YOUR ACCOUNTS." Immediately beneath this heading the notice states: "SRP Federal Credit Union has recently made updates to your Membership Agreement and associated account disclosures. A summary of these changes is provided below. Please review these changes carefully. These updated terms will become effective August 1, 2021." The body of the notice contains a two-column table summarizing the changes by category. One row addresses "Resolving Claims" and informs members of an "[u]pdate to the Resolving Claims section, including your right to opt out of the Arbitration provision*." The asterisk corresponds to a footnote below the table, which provides in full:

> *The new Arbitration provision will become effective on August 1, 2021. You will have until September 15, 2021 to exercise your right to opt out of this provision. If you do not opt out of this provision, the continued use of your Credit Union account

> and services will act as your consent to this proposed Arbitration Agreement. Please visit www.srpfcu.org/MembershipAgreement for additional information.

Reading the document as a whole, the court concludes it provided Black, McGrier, Ortiz, Whitfield, Chase, and Dunn with "reasonable notice of an offer to enter into an arbitration agreement." *Marshall*, 112 F.4th at 218. The more difficult question is whether they "manifested [their] assent to that agreement" by failing to opt out and continuing to use their accounts. *Id.*

The Supreme Court of South Carolina recently addressed whether silence and inaction can constitute acceptance of an arbitration agreement in *Lampo v. Amedisys Holding, LLC*, 914 S.E.2d 139 (S.C. 2025). There, Lampo was hired in July 2013 under an employment agreement that did not contain an arbitration provision. *Id.* at 141. A month later, her employer sent an email to all employees announcing a new "Dispute Resolution Agreement" requiring arbitration of all disputes. *Id.* The email directed employees to click a link to access the agreement and stated that if an employee did not opt out within 30 days, the employee's "continuation of his or her employment with the Company shall constitute Employee's and Company's mutual acceptance of the terms of this Agreement." *Id.* at 142. Lampo clicked the link and acknowledged receipt of the agreement, but she did not submit an opt-out form. *Id.* She continued working for nearly five years before being terminated. *Id.* When she filed suit, her employer moved to compel arbitration, arguing she had accepted the agreement by failing to opt out and continuing to work. *Id.* The trial court denied the motion, and the South Carolina Court of Appeals reversed, concluding that Lampo accepted the agreement "as a matter of law." *Id.*

The Supreme Court reversed the Court of Appeals in a 3–2 decision. The Supreme Court began by recognizing that an offeree's silence ordinarily does not constitute acceptance. *Id.* at 144. It then looked to Section 69(1) of the Restatement (Second) of Contracts, which identifies three exceptions to that general rule:

> (1) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation;
>
> (2) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer; and
>
> (3) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

Id. at 144–45 (citing Restatement (Second) of Contracts § 69(1) (A.L.I. 1981)).[12]

The Supreme Court found no exception applicable. The first exception was "completely inapplicable" because the employer "did not offer Lampo services with the expectation she would pay for them." *Id.* at 145. Nor did the second exception apply, because even though the employer "informed Lampo she would be deemed to have accepted the offer if she did not opt out and continued to work," there was "nothing to indicate she did anything different [after receiving the offer] that could be considered a manifestation of assent." *Id.* at 144, 145. "She simply continued to perform the job duties for which she was already under contract to be paid." *Id.* at 145. Finally, the third exception did not apply because the parties' only prior dealing — "the commencement

[12] The Supreme Court left open the possibility "that silence and inaction may be a manifestation of assent in other circumstances, as well." *Lampo*, 914 S.E.2d at 145.

of Lampo's employment" a month earlier — provided "no basis on which Lampo should be expected to inform [the employer] of her intent not to accept an offer to modify the employment relationship." *Id.* The Supreme Court thus reversed and remanded, holding as a matter of law that Lampo had not accepted her employer's offer to arbitrate. *Id.* at 144, 147.

At first glance, *Lampo* would seem to control the assent question here: like the employer in *Lampo*, SRP attempts to establish acceptance based on Plaintiffs' failure to opt out and continued use of their accounts. And as with Lampo herself, there is no evidence Plaintiffs relied on SRP's arbitration offer in a "definite and substantial" way or otherwise manifested an objective intent to accept it. *See* Restatement (Second) of Contracts § 69, cmt. c ("The mere fact that an offeror states that silence will constitute acceptance does not deprive the offeree of his privilege to remain silent without accepting. . . . The case for acceptance is strongest when the reliance is definite and substantial or when the intent to accept is objectively manifested though not communicated to the offeror.").

At the same time, two considerations arguably distinguish this case from *Lampo*. First, most Plaintiffs "agree[d] to be bound by" the Membership Agreement "as amended from time to time" when opening an account with SRP.[13] Dkt. Nos. 53-5 at 2; 53-6 at 2; 53-7 at 2; 53-8 at 2;

[13] The court uses the word "most" because SRP has been unable to locate the applications for Black and McGrier, who joined the credit union in 1996 and 2008. Dkt. No. 53-10 ¶¶ 20, 21. To fill this evidentiary gap, SRP relies on the declaration by its Chief Technology Officer, who states: "*On information and belief*, the same or substantially similar language, by which applicants acknowledged and agreed to be bound by the SRP membership agreement, as amended from time to time, was also included in SRP membership application forms in use in the period 1996 to 2014." *Id.* ¶ 9 (emphasis added). Declaration statements made "on information and belief," (Continued)

53-9 at 2. This language could supply what was missing in *Lampo* to satisfy Section 69(1)'s third exception. Specifically, Plaintiffs' express promise to be bound by future amendments could constitute the kind of "previous dealings or otherwise" that would have made it reasonable for SRP to treat their silence as acceptance. Restatement (Second) of Contracts § 69(1)(c); *see Neal v. Purdue Fed. Credit Union*, 201 N.E.2d 253, 263 (Ind. Ct. App. 2022) (concluding that, based on the parties' previous dealings, "it was reasonable that [plaintiff] should have notified [the credit union] if he did not intend to accept the offer [to arbitrate], and that [he] accepted the offer by remaining silent and inactive past the deadline").

Second, this case, unlike *Lampo*, arises in the consumer context. The recently adopted Restatement of Consumer Contracts ("RCC") departs from the Second Restatement's rule that a party's silence ordinarily does not operate as acceptance. Under Section 3 of the RCC, a business may modify "a standard contract term in a consumer contract governing an ongoing relationship" if:

> (1) the consumer received reasonable notice of the proposed modified term and a reasonable opportunity to review it;
>
> (2) the consumer received a reasonable opportunity, including reasonable notice of the opportunity, to reject the proposed modified term and continue the contractual relationship under the existing term;
>
> (3) the consumer received reasonable notice that continuing the contractual relationship without rejecting the proposed modified term will result in the modification being adopted; and

---

however, are not competent summary-judgment evidence, 10B Wright & Miller's Federal Practice & Procedure § 2738 (4th ed. 2025), and thus cannot be used to support a motion to compel arbitration.

> (4) the consumer either:
>
> (A) manifested assent to the modified term, or
>
> (B) did not reject the proposed modified term and continued to take the benefit of the contractual relationship after the expiration of the rejection period provided in the proposal, or, if such period is not provided, after the expiration of reasonable time to review and reject.

Restatement of Consumer Contracts § 3 (A.L.I. 2024). The RCC thus "recognizes silence by acceptance as the default rule, so long as the offeree received reasonable notice and an opportunity to opt out without penalty and continued business with the offeror." *Land v. IU Credit Union*, 226 N.E.3d 194, 197 (Ind. 2024).

Of course, it is not for this court to extend South Carolina law beyond its current boundaries, and the court takes no position on whether the RCC's approach is sound. *See St. Paul Fire & Marine Ins. Co. v. Jacobson*, 48 F.3d 778, 783 (4th Cir. 1995) ("The federal courts in diversity cases, whose function it is to ascertain and apply the law of a State as it exists, should not create or expand that State's public policy."). The court notes only that *Lampo* did not involve a consumer contract, and the RCC adopts a different rule for modifying such contracts.

* * *

"Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save time, energy, and resources and help build a cooperative judicial federalism." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 77 (1997) (internal quotation marks omitted). South Carolina Appellate Court Rule 244 permits certification if a state-law question "may be determinative of the cause then pending in the certifying court"

and "it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court." Rule 244(a), SCACR. In the court's view, both requirements are satisfied here.

First, whether Black, McGrier, Ortiz, Whitfield, Chase, and Dunn accepted the arbitration provision by failing to opt out and continuing to use their accounts "may be determinative of the cause . . . pending in [this] court." *Id.* If the Supreme Court of South Carolina holds that silence and continued use of an account operates as acceptance in the consumer context, the six Plaintiffs' claims would (absent a finding of illusoriness) proceed to arbitration.[14] But if it reaches the opposite conclusion, their claims would remain in federal court.

Second, it is unclear to the court whether *Lampo* controls the precise issue presented here. *Lampo* held that an employee does not manifest assent to an offer to form an arbitration agreement by remaining silent and continuing to work. But this case arguably presents a different question: whether silence and continued account use constitutes acceptance of a modification to a consumer contract when the consumer agreed upfront to be bound by the contract "as amended from time to time." Given this distinction, the court cannot confidently predict what a South Carolina court "would do if confronted with the same fact pattern." *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994). And because the question has broad implications for consumer transactions in the state, the court finds it prudent to seek a definitive answer from the Supreme Court of South Carolina. Therefore, pursuant to South Carolina Appellate Court Rule 244, the court certifies the following question to the Supreme Court for guidance:

[14] Plaintiffs do not argue their claims fall outside the scope of the arbitration provision.

> Does a consumer who agreed to be bound by an agreement "as amended from time to time" when opening an account manifest assent to a proposed modification adding an arbitration provision by failing to opt out within the time provided and continuing to use the account?

2. Illusoriness

The court next considers Plaintiffs' contention that the modification clause in the 2021 Membership Agreement renders the agreement's arbitration provision illusory. The court believes this argument, too, presents an unsettled issue of law worthy of certification to the Supreme Court of South Carolina.

The modification clause provides as follows:

> The Credit Union, in its sole discretion, may change any term or condition of this Agreement, including the method for determining dividends, at any time without notice except as expressly required by applicable law. If applicable laws provide no express time period, then notice ten (10) days or more in advance of the effective date of any change shall be deemed sufficient.

Dkt No. 53-3 at 18. In Plaintiffs' view, this language renders the arbitration provision illusory because SRP retained the unfettered right to unilaterally change any and all terms of the 2021 Membership Agreement at any time, without notice. Dkt. No. 58 at 13–15.

An illusory promise is a "promise which by [its] terms make[s] performance entirely optional with the 'promisor.'" Restatement (Second) of Contracts § 77 cmt. a; *see also* 17A Am. Jur. 2d Contracts § 125 ("[A] promise is illusory when it fails to bind the promisor, who retains the option of discontinuing performance."). Such a promise "impose[s] no obligation" and "cannot serve as consideration." 3 Williston on Contracts § 7:7 (4th ed. 2025). Therefore, when the promisor can "escape performance of anything detrimental to itself or beneficial to the promisee,"

consideration is lacking, and no contract is formed. *Id.*; *see also Johnson v. Cont'l Fin. Co.*, 131 F.4th 169, 178 (4th Cir. 2025) ("It is rudimentary contract law that an agreement lacks consideration, and is therefore never formed, when it consists entirely of illusory promises.").

The 2021 Membership Agreement would seem to fit this mold. The modification clause allows SRP, "in its sole discretion," to "change any term or condition of [the] Agreement . . . at any time without notice except as expressly required by applicable law." The only stated restriction on SRP's ability to change terms whenever it chooses is that it must give members notice when some "applicable law" requires it.[15] But a promise to do something one is already obligated to do is not consideration. *City of Spartanburg v. Spartan Villa*, 253 S.E.2d 501, 503 (S.C. 1978); *Castell v. Stephenson Fin. Co.*, 135 S.E.2d 311, 315 (S.C. 1964); *Atl. Joint Stock Land Bank of Raleigh v. Latta*, 162 S.E. 68, 69 (S.C. 1932). Indeed, "[a] bargained-for-exchange by definition assumes that each party will undertake some obligation beyond those already imposed by law." *Johnson*, 131 F.4th at 180. Thus, because the modification clause imposes no express limit on SRP's discretion beyond what the law already requires, all of SRP's promises would

[15] The court rejects SRP's assertion that it has a "contractual obligation" to give members at least ten days' notice before any change takes effect. Dkt. No. 59 at 7. The modification clause's second sentence applies *only if* some "applicable law" requires notice *and* that law does not provide an "express time period." If no "applicable law" requires notice, SRP remains free to modify the agreement at a whim.

appear to be illusory, leaving the 2021 Membership Agreement — and its arbitration provision — unsupported by consideration.[16]

That being said, courts are generally reluctant to find contracts illusory and will often imply limits on a party's discretion to avoid that conclusion. *See* 2 Corbin on Contracts § 5.28 (rev. ed. 2025) ("The tendency of the law is to avoid the finding that no contract arose due to an illusory promise when it appears that the parties intended a contract. Through a process of interpretation, in the absence of express restrictions, courts find implied promises to prevent a party's promise from being performable merely at the whim of the promisor."). As relevant here, some courts have held that when a contract containing an arbitration provision includes a unilateral modification

[16] To be sure, an arbitration provision within a broader contract does not require independent consideration if the contract as a whole is supported by consideration. *See Cox v. Time Warner Cable, Inc.*, Nos. 3:12-cv-03333-JFA, 4:12-cv-03407-JFA, 2013 WL 5469992, at *5 (D.S.C. Sept. 30, 2013); *Furse v. Timber Acquisition*, 401 S.E.2d 155, 156 (S.C. 1991). But if the larger contract lacks consideration because all of a party's promises are illusory, the contract was never formed. And if the contract was never formed, no provision within it can be enforced. *See Johnson*, 131 F.4th at 173 ("A claim that a contract is illusory calls into question the very existence of the contract . . . ."); *id.* at 176 ("There is nothing to enforce if a contract never existed.").

Further, the FAA's severability principle does not bar the court from considering Plaintiffs' illusoriness challenge. Under *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), and its progeny, "a challenge to the *validity* of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (emphasis added). An illusoriness challenge, however, goes to *formation*: whether any contract came into existence in the first place. *Johnson*, 131 F.4th at 178. That issue is always for a court to decide. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010) ("[T]he court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce."); *Id.* at 299 ("[C]ourts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue.").

clause, the implied covenant of good faith and fair dealing sufficiently constrains the promisor's discretion to prevent a finding of illusoriness. *See, e.g.*, *Canteen v. Charlotte Metro Credit Union*, 900 S.E.2d 890, 897 (N.C. 2024) (holding that the implied covenant of good faith and fair dealing "serve[d] as a sufficient limitation on [the credit union's] freedom of choice" and "remedie[d] any purported issues of illusoriness" (internal quotation marks omitted)); *Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051, 1066 (S.D. Cal. 2015) ("The restriction on Amazon's discretion imposed by the duty of good faith and fair dealing saves the Agreement from being illusory."); *Bassett v. Elec. Arts, Inc.*, 93 F. Supp. 3d 95, 106–07 (E.D.N.Y. 2015) ("Under New York and California law, the fact that one party to an arbitration agreement has the unilateral right to modify that agreement does not automatically render the agreement illusory, as the discretionary power to modify or terminate an agreement carries with it the duty to exercise that power in good faith and fairly." (internal quotation marks omitted)); *but see Nat'l Fed'n of the Blind v. Container Store, Inc.*, 904 F.3d 70, 87 (1st Cir. 2018) ("[W]hile the Container Store argues that the duty of good faith and fair dealing renders this contract not illusory, it provides no legal support pursuant to Texas law for this proposition."); *Kiser v. Truist Fin. Corp.*, 796 F. Supp. 3d 207, 239–40 (E.D. Va. 2025) ("Truist cites several cases that have found that a unilateral change-in-terms provision without notice does not render a contract illusory because the party with unilateral power is constrained by the duty of good faith and fair dealing. Virginia, however, is unlikely to adopt this approach because it is inconsistent with existing case law on the implied covenant." (internal citations omitted)).

South Carolina law recognizes the existence of an implied covenant of good faith and fair dealing in every contract. *Adams v. G.J. Creel & Sons, Inc.*, 465 S.E.2d 84, 85 (S.C. 1995). The covenant's "underlying purpose" is "to protect the intentions of the parties to the contract." *Williams v. Riedman*, 529 S.E.2d 28, 39 (S.C. Ct. App. 2000). "In the absence of an express provision therefor, [South Carolina courts] will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made." *Hall v. UBS Fin. Servs.*, 866 S.E.2d 337, 342 (S.C. 2021) (quoting *Williams*, 529 S.E.2d at 39). The court, however, is unaware of any South Carolina decision applying the implied covenant of good faith and fair dealing in the manner contemplated here — i.e., to save an agreement from illusoriness.

With no South Carolina precedent on point, the court concludes certification is appropriate on this issue as well. The Supreme Court's answer may be outcome determinative: if the covenant does not sufficiently constrain SRP's discretion under the modification clause, the 2021 Membership Agreement would remain illusory and unsupported by consideration — and the arbitration provision within it could not be enforced. Moreover, given the ubiquity of modification clauses in consumer contracts, an authoritative answer would offer clarity for an issue that is sure to recur. For these reasons, the court elects to certify a second question to the Supreme Court of South Carolina:

> When a modification clause allows one party, "in its sole discretion," to change any contract term "at any time without notice except as expressly required by applicable law," does the implied covenant of good faith and fair dealing apply to limit the party's discretion and save the agreement from illusoriness?

IV. CONCLUSION

Based on the foregoing, the court (1) denies SRP's Rule 12(b)(1) motion to dismiss for lack of standing; (2) finds that Plaintiff Lataveia Allen manifested assent to the arbitration provision in the 2021 Membership Agreement; and (3) certifies the two questions articulated above to the Supreme Court of South Carolina. The court will defer ruling on the remaining issues presented by SRP's motion to compel arbitration and its Rule 12(b)(6) motion pending a response from the Supreme Court. The Clerk shall forward a copy of this order to the Supreme Court under this court's official seal.

IT IS SO ORDERED.

Cameron McGowan Currie
Cameron McGowan Currie
Senior United States District Judge

Columbia, South Carolina
March 23, 2026

A TRUE COPY

ATTEST: ROBIN L. BLUME, CLERK

BY:

DEPUTY CLERK