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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED QUESTIONS
United States District Court for the District of South Carolina

Cameron McGowan Currie, Senior U.S. District Judge

Appellate Case No. 2026-000728

Latavia Allen, *on behalf of herself and all other similarly situated*, ... Plaintiff,

v.

SRP Federal Credit Union ....Defendant.

Norman Black, *on behalf of himself and all other similarly situated*, ... Plaintiff,

v.

SRP Federal Credit Union ....Defendant.

Ge-Quoia Whitfield, *on behalf of herself and all other similarly situated*, ... Plaintiff,

v.

SRP Federal Credit Union ....Defendant.

Rosemary Ortiz, *on behalf of herself and all other similarly situated*, ... Plaintiff,

v.

SRP Federal Credit Union ....Defendant.

Theresa McGrier, *on behalf of herself and all other similarly situated*,........................ Plaintiff,

v.

SRP Federal Credit Union ....Defendant.

Shannon Dunn, *on behalf of herself and all other similarly situated*, ... Plaintiff,

v.

SRP Federal Credit Union ....Defendant.

Ricky Chase, *on behalf of himself and all other similarly situated*, ... Plaintiff,

v.

SRP Federal Credit Union ....Defendant.

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INTRODUCTION

There are two certified questions before the Court. The Court should answer the first certified question, **"Yes."** When Plaintiffs became members of SRP Federal Credit Union ("SRP"), they expressly agreed to be bound by an agreement "as amended from time to time." SRP later provided advance notice of an amendment to an existing Arbitration Provision, expressly advising Plaintiffs that continued use of their accounts without opting out would constitute acceptance, and affording them ample time to opt out without affecting any other membership right. Plaintiffs did not opt out and continued using their SRP accounts and services. Under these circumstances, Plaintiffs manifested assent to the amended Arbitration Provision. The overwhelming authority across the country supports this conclusion. *See infra* Section I.A (providing unilateral change-in-terms provision binds a party to later amendments, including amendments to arbitration provisions, especially when the party is provided with notice and a right to opt out but fails to do so).

This case is materially different from the Court's decision in *Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 914 S.E.2d 139 (2025). *Lampo* involved an employment contract that did not include an agreed-on unilateral change-in-terms provision and did not involve circumstances where it was reasonable to believe the employee agreed that silence or failure to act may manifest assent to a new arbitration provision. Here, by contrast, Plaintiffs expressly agreed at the outset that the Membership Agreement could be amended from time to time in SRP's sole discretion. And when SRP amended the Arbitration Provision, it specifically told Plaintiffs how to reject the amendment, without consequence to any other of their membership rights, and that the failure to do so, coupled with continued use of SRP's services, would constitute acceptance. These circumstances bring this case within the very situations *Lampo* recognized in which silence and inaction would manifest assent: where the offeror gives the offeree reason to understand that silence will constitute assent and where the parties' prior dealings or other circumstances make it reasonable for the offeree to object if the offeree does not intend to accept. *Id.* at 315, 914 S.E.2d at 145.

Context reinforces this conclusion. The Membership Agreement governs an ongoing, at-will relationship between a federal credit union and its member-owners, not the employment relationship at issue in *Lampo*. Plaintiffs acquired meaningful membership and voting rights when they joined SRP, remained free to terminate their memberships at any time, and expressly agreed that the Membership Agreement could be amended over time.[1] This contractual flexibility is particularly important in a highly regulated financial-services relationship governed by changing legal, regulatory, technological, and competitive market conditions. Change-in-terms provisions permit that ongoing relationship to function efficiently while notice and opt-out protections preserve members' ability to reject material changes.

The second certified question stands on a different footing because the Court need not—and under *Prima Paint*, should not—reach it. 388 U.S. 395 (1967). Plaintiffs contend the Membership Agreement was illusory from its inception because its unilateral modification provision rendered the Agreement as a whole invalid. That is a challenge to the validity of the contract as a whole, not specifically to the Arbitration Provision. Under *Prima Paint* and the severability doctrine, that issue is for the arbitrator once the Court determines that the parties

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[1] As explained below, SRP members are at-will members, who are free to terminate their membership at any time for any reason at all. In contrast, SRP's right to terminate Plaintiffs' membership is constrained by certain terms in the Membership Agreement.

agreed to arbitrate. *See infra* Section II.A. Accordingly, if the Court answers the first certified question "Yes," it should decline to answer the second.

If the Court nevertheless reaches the second question, it should answer **"Yes."** SRP's authority to modify the Membership Agreement is not unfettered. It is constrained by the Agreement's own terms, South Carolina's common law—including applicable notice principles and the implied covenant of good faith and fair dealing—and federal statutory law. Those express and implied limitations foreclose Plaintiffs' contention that SRP's obligations were entirely optional or that the Membership Agreement was illusory from its inception. *See infra* Section II.D.

STATEMENT OF THE CASE

SRP is a federal credit union, federally insured by the NCUA, serving more than 195,000 members in Georgia and South Carolina. ECF No. 60 at 4 ("Order"). This matter originated as twelve separate class actions. Seven named Plaintiffs filed a consolidated complaint on April 7, 2025, while five others voluntarily dismissed their cases. *Id.* at 9. On October 9, 2025, the district court dismissed the consolidated complaint without prejudice and with leave to amend. *Id.* at 10.

Plaintiffs filed an amended consolidated complaint on November 7, 2025, asserting eight causes of action against SRP. *Id.* at 11. Plaintiffs allege they are members of SRP and their personal information was compromised in a data incident that occurred between September 5, 2024, and November 4, 2024. *Id.* at 7. In response, SRP filed a motion to compel arbitration, or, in the alternative, to dismiss Plaintiffs' consolidated amended complaint under Rules 12(b)(1) or 12(b)(6) of the Federal Rules of Civil Procedure on November 21, 2025. *Id.* at 11. Plaintiffs opposed the motion on January 9, 2026, and SRP filed a reply on January 26, 2026. *Id.*

On March 23, 2026, the district court issued an Order denying Defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), except as to Plaintiffs' claims for injunctive relief, which the court dismissed, and certifying questions to this Court related to Defendant's motion to compel arbitration. *See generally* (Order). This Court issued a Certification Order accepting the certified questions on April 22, 2026. (Order Accepting Certified Questions). This brief follows.

STATEMENT OF THE FACTS

I. Membership Application and Agreement

As part of the application process, all SRP members—including Plaintiffs—must complete SRP's membership application form.[2] Since at least 2014, SRP's membership application form ("Membership Application") has contained the following acknowledgment and agreement to be bound by the SRP Membership Agreement: "I also acknowledge that I have received and agree to be bound by any terms and conditions . . . in the Membership Agreement . . . as amended from time to time, which are incorporated herein by reference." ECF No. 53-10 at ¶ 8. On information and belief, the same or substantially similar language was also included in SRP membership application forms in use in the period 1996 to 2014. *Id.* at ¶ 9.

The current version of SRP's Membership Agreement has been in effect since October 1, 2023. ECF No. 53-1. The 2023 Membership Agreement is the successor to earlier versions of the

[2] Plaintiff Black opened a joint account and became a member of SRP on March 21, 1996. ECF No. 53-10 at ¶ 20. Plaintiff McGrier first opened an account and became a member of SRP on April 23, 2008. *Id.* at ¶ 21. McGrier opened an additional individual account on March 18, 2011, and a joint account on October 5, 2016. *Id.* Plaintiff Ortiz opened a joint account and became a member of SRP on June 12, 2014. *Id.* at ¶ 22. Plaintiff Whitfield first opened an account and became a member of SRP on August 24, 2015. *Id.* at ¶ 23. She opened a subsequent account on December 21, 2017. *Id.* Plaintiff Chase opened accounts and became a member of SRP on August 5, 2019. *Id.* at ¶ 24. Plaintiff Chase was an active SRP member through May 29, 2022, and then became an inactive member. *Id.* Plaintiff Dunn opened accounts and became a member of SRP on December 30, 2019. *Id.* at ¶ 25. Plaintiff Allen opened accounts and became a member of SRP on June 28, 2022. *Id.* at ¶ 26.

agreement dating back to the earliest membership of any Plaintiff in SRP (1996). ECF No. 53-10 at ¶ 11. From 1996 to the present, each Membership Agreement contained a clause allowing SRP to amend the terms of the Agreement (hereinafter sometimes referred to as a "change in terms" provision). *Id*. For purposes of the certified questions before the Court, Plaintiffs and the District Court focus on the 2021 Membership Agreement and its change-in-terms provision because SRP materially amended the existing arbitration provision that year and provided members a right to opt out of the amendment. The Membership Agreement's change-in-terms provision states:

> 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.

ECF No. 53-3 ¶ 34.[3]

In addition, the first page of both the 2021 and 2023 Membership Agreements provides (in bold font) that SRP "may modify, change, add provisions or terms we deem necessary or in the best interests of the Credit Union, or amend the terms of this Agreement, Rate Sheet, Fee Schedule, and Privacy Policy at any time. Any change shall be effective immediately unless otherwise specifically required by applicable law." ECF No. 53-1 at 1; ECF No. 53-3 at 1.

II. The Arbitration Provision Subject to the Certified Questions

In June 2021, SRP notified members with active accounts, including Plaintiffs, of certain amendments to the Membership Agreement effective over a month later, August 1, 2021, including

[3] The current 2023 Membership Agreement contains a nearly identical change-in-terms provision. ECF No. 53-1 at § 34. In July 2023, SRP sent its members a change in terms notice announcing updates to the 2021 Membership Agreement effective August 1, 2023. *See* ECF No. 53-4. While the 2023 Membership Agreement contains the same opt out clause as its predecessor, the 2023 amendments did not substantively change the arbitration provision to trigger a "second" right to opt out for Plaintiffs who were all already members. ECF No. 53-10 ¶ 28; Order at p. 7.

an updated arbitration provision ("2021 Notice"). ECF No. 53-2. SRP sent the 2021 Notice to the email or mailing address on file for each member, including Plaintiffs,[4] in accordance with their respective membership profiles. ECF No. 53-10 at ¶ 16. The 2021 Notice advised that "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." ECF No. 53-2.

For "Resolving Claims," the 2021 Notice states: "Update to the Resolving Claims section, **including your right to opt out of the Arbitration provision***." *Id*. The asterisk provides:

> *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.srpcu.org/MembershipAgreement for additional information.

Id. The September 15, 2021 opt-out deadline was forty-five days after the amendment's August 1 effective date and more than two and a half months after SRP sent the notice.

Further, the 2021 Notice generally advises: "Please visit our website at www.srpcu.org to obtain an electronic version of the Membership Agreement. If you would like a paper copy, please stop by any branch or contact us at (800) 237-9829." ECF No. 53-2 at 2.

The Arbitration Provisions in the 2021 and 2023 Membership Agreements are identical in relevant substance and provide in part:

[4] As the district court recognized, Plaintiff Allen was not yet a member of SRP, so she did not receive the June 2021 Notice. Order at 23. She signed the Membership Application in 2022, thereby agreeing to the Arbitration Provision contained in the 2021 Membership Agreement, and did not exercise the opt-out right available to new members when they join SRP. *Id.*

ARBITRATION PROVISION

READ THIS ARBITRATION PROVISION CAREFULLY: IT WILL IMPACT HOW LEGAL CLAIMS YOU AND WE HAVE AGAINST EACH OTHER ARE RESOLVED.

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.

YOUR RIGHT TO OPT OUT; EFFECT OF ARBITRATION.

This Arbitration Provision will apply to you and us and to your account as of the date your account was opened (or, if you are an existing member, as of the date of this Arbitration Provision), unless you opt out by providing proper and timely notice as set forth below. If a Claim is arbitrated, neither you nor we will have the right to: (1) have a court or a jury decide the Claim; (2) engage in information-gathering (discovery) to the same extent as in court; (3) participate in a class action, private attorney general or other representative action in court or in arbitration; or (4) join or consolidate a Claim with those of any other person.

. . .

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. Your

> **decision to opt out will not affect any other provision of your Membership Agreement. If the Arbitration Provision of your Membership Agreement has already been delivered or otherwise made available to you, amendments to your Membership Agreement will not give you a new right to opt out of this Arbitration Provision, unless we amend a substantive clause of the Arbitration Provision.**

ECF No. 53-1 at 21–23; ECF No. 53-3 at 20–22.

In July 2023, SRP notified members with active accounts, including Plaintiffs Black, McGrier, Ortiz, Whitfield, Dunn, and Allen, of a further change in terms to the Membership Agreement ("2023 Notice"). ECF No. 53-4. As to "Resolving Claims," the 2023 Notice merely "[a]dded language clarifying where jurisdiction information is located in the Agreement," and similarly directed members to visit SRP's website or branch to obtain a copy of the updated agreement. *Id.* In substance, therefore, the 2021 and 2023 Arbitration Provisions are the same. Because the 2023 amendment to the Arbitration Provision was not substantive, the right to opt out of the Arbitration Provision was not triggered under the Membership Agreement's terms.[5] *See* ECF No. 53-1 at 23. For purposes of the certified questions before the Court, therefore, the parties and district court have appropriately focused on the 2021 Notice and Membership Agreement.

III. Plaintiffs Failed to Opt Out of the Modified Arbitration Provision

SRP sent the 2021 Notice to the mailing address or email address on file for each Plaintiff with an active account advising that the existing arbitration provision would be modified in substantive part, and the failure to opt out and continued use of the account would constitute assent

[5] Under the Arbitration Provisions of the 2021 and 2023 Membership Agreements (which are identical for all material purposes), when material modifications are made to the arbitration provision, the right to opt out is triggered, without consequence to any other rights or privileges enjoyed by the Member. Similarly, under the 2021 and 2023 Membership Agreements, every new member has the right to opt out of the arbitration provision if they choose when they become members. ECF Nos. 53-1 at 23 & 53-3 at 23.

to the modified arbitration provision. Order at 24–25. Plaintiffs never opted out of the Arbitration Provision and continued using their accounts at SRP thereby assenting to the modified arbitration provision. *Id.* at 24.

IV. Plaintiffs File this Lawsuit

This matter originated as twelve separate class action lawsuits. Plaintiffs' amended consolidated complaint alleges several causes of action arising from a 2024 data breach at SRP. *Id.* at 11. SRP filed a motion to compel arbitration based on the Arbitration Provision in the Membership Agreements and, in the alternative, a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Id.* On March 23, 2026, the district court denied SRP's motion to dismiss under Rule 12(b)(6) but certified two questions as to the Arbitration Provision to this Court. *See generally id.* This brief follows.

STANDARD

"[The] standard of review when answering a certified question depends on the context of the case." *Sullivan Mgmt. v. Fireman's Fund Ins. Co.*, 437 S.C. 587, 590, 879 S.E.2d 742, 743 (2022). Typically, "[i]n answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right." *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008). However, when the "question derives from contract interpretation," the Court's review is "limit[ed] . . . to ascertaining the intent of the parties on the language used in the [contract]." *Sullivan*, 437 S.C. at 590, 879 S.E.2d at 743.

ARGUMENT

The district court already found "no genuine dispute that Black, McGrier, Ortiz, Whitfield, Chase, and Dunn received the 2021 [N]otice" informing them of the updated Arbitration Provision as well as their right to opt out by September 15, 2021. Order at 25. It also found the 2021 Notice provided Plaintiffs with "reasonable notice of an offer to enter into an arbitration agreement." *Id.* at 26 (quoting *Marshall v. Georgetown Mem'l Hosp.*, 112 F.4th 211, 218 (4th Cir. 2024)). The remaining issues are the two questions certified to this Court.[6]

> 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[7] 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?

Although the parties are before this Court on certified questions of law, context matters. *See Poly-Med, Inc. v. Novus Sci. Pte. Ltd.*, 437 S.C. 343, 346, 878 S.E.2d 896, 898 (2022) (providing "legal decision-making is often context dependent"). The certified questions involve the rights and obligations of parties to a cooperative association federal credit union relationship. Under these circumstances, the Court should answer the first certified question 'Yes' and decline

[6] Importantly, Plaintiffs failed to oppose SRP's motion to compel arbitration on any other grounds commonly raised, such as unconscionability, fraud, or duress. The arbitration clause in the Membership Agreement is conspicuous, fair, and neutrally applied in all circumstances for both parties. *See* ECF No. 53-3 at 22–23.

[7] To be clear, the 2021 Membership Agreement did not "add" an arbitration provision. It modified an existing arbitration provision already within prior versions of the Membership Agreement.

to answer the second under *Prima Paint*. If the Court reaches the second question, it should answer that question, "Yes," as well.

I. Plaintiffs manifested assent to the amended Arbitration Provision by agreeing to be bound by the Membership Agreement "as amended from time to time," receiving advance notice and a penalty-free right to opt out, and continuing to use SRP's services without opting out.

The arbitration agreement between SRP and Plaintiffs is governed by the Federal Arbitration Act ("FAA"). ECF No. 53-3 at 22. The FAA governs written arbitration agreements "evidencing a transaction involving commerce," and such agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court of the United States has held the term "involving commerce" is interpreted broadly, so the FAA governs any arbitration agreement that affects commerce in any way. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273–74 (1995) ("[T]he word 'involving' is broad and is indeed the functional equivalent of 'affecting.'"). And even though "banking and related financial activities are of profound local concern . . . it does not follow that these same activities lack important interstate attributes." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980).

Arbitration "contract validity is normally addressed applying general principles of state law governing the formation of contracts." *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019) (citation omitted). As to the first certified question—whether Plaintiffs manifested assent to the amended Arbitration Provision—the Court should begin with its recent pronouncement: "court[s] must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions." *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021).

Under South Carolina law, SRP need only show that each Plaintiff had reasonable notice of an offer to enter the arbitration agreement and manifested assent to that agreement. *See Marshall*, 112 F.4th at 218. The district court already found Plaintiffs had notice. The question is whether they manifested assent.

In opening a bank account with SRP, all customers must execute the Membership Application, in which they "agree to be bound by any terms and conditions . . . in the Membership Agreement . . . as amended from time to time, which are incorporated herein by reference." *E.g.*, ECF No. 53-5. The Membership Applications thus incorporate the Membership Agreement by reference. *Id.* The Membership Agreement then provides:

> 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.

ECF Nos. 53-3 at § 34.

As expressly permitted in the Membership Agreement, SRP notified each Plaintiff of the updated Arbitration Provision in the 2021 Notice, provided ample time to opt out without affecting their other membership rights, and informed Plaintiffs that "continued use of [their] Credit Union account and services will act as [their] consent to this proposed Arbitration Agreement." ECF No. 53-2. Plaintiffs failed to opt out and continued using their accounts with SRP. These circumstances create a binding arbitration agreement between SRP and Plaintiffs.[8]

[8] Plaintiff Allen executed her Membership Application in 2022, agreeing then to be bound by the 2021 Membership Agreement. Although the 2021 Membership Agreement arbitration permitted her to opt out, Allen did not do so when she became a member. *See supra* note 4. Thus, there is no question Allen agreed to be bound by the Arbitration Provision in the 2021 Membership Agreement, and the modification in 2023 was not substantive and did not afford current members another opportunity to opt out.

A. Courts overwhelmingly enforce arbitration amendments where the consumer agreed to a change-in-terms provision, received notice and an opportunity to opt out, and continued the relationship without opting out.

"Fundamentally, parties are generally free to contract as they desire. It is the role of a court to give effect to the contracting parties' intentions." *Poly-Med, Inc.*, 437 S.C. at 354, 878 S.E.2d at 902 (citing *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). When parties agree to allow one party to unilaterally change the terms of the original contract through a change-in-terms provision, the Court must not second-guess the parties' intent. *Cf. Lee v. Univ. of S.C.*, 407 S.C. 512, 518, 757 S.E.2d 394, 397 (2014) ("A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." (quoting *S.C. Dep't. of Transp. v. M & T Enters. of Mt. Pleasant*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008))).

Indeed, courts across the country have held that unilateral change-in-terms provisions bind parties who agree to them, including amendments to arbitration provisions, especially when the party is provided with a right to opt out of the amendment. In such circumstances, the party manifests assent to the amendment through the initial agreement to the change-in-terms provision and the failure to opt out of the amendment.

For instance, in *Beneficial National Bank v. Payton*, 214 F. Supp. 2d 679 (S.D. Miss. 2001), the Southern District of Mississippi found a credit-card holder manifested assent to a later added arbitration provision. In that case, the cardholder financed his purchase of a home satellite system through a revolving credit card account with Beneficial. *Id.* at 681. When applying for the credit card, the cardholder signed an application in which he agreed to the cardholder agreement. *Id.* at 682–83. At the time, the cardholder agreement did not include an arbitration agreement. *Id.* It did, however, include a change-in-terms provision, allowing Beneficial to unilaterally change the terms of the agreement. *Id.* at 683. A year later, Beneficial did just that and added an arbitration provision to the agreement after notice and an opportunity for the consumer to opt out. *Id.* at 684.

The court found the cardholder assented to the arbitration provision by failing to opt out. *Id.* at 687. Specifically, the court stated, "[t]he agreement authorized Beneficial to 'change the terms of the agreement,' which Beneficial did by mailing to its cardholders . . . a notice of the change in terms which included an arbitration provision." *Id.* The court continued: "[t]he notice to [the consumer] specifically informed him that he had the right to reject the arbitration provision, and yet the record reflects that he did not avail himself of that right." *Id.* The court rejected the consumer's argument that "the 'change of terms' provision only authorized Beneficial to change existing terms of the agreement and did not give Beneficial the right to add altogether new terms." *Id.* at 686. Citing an earlier case within the district—*Bank One, N.A. v. Coates*—the court found it made no difference "because the agreement . . . stated simply, unambiguously and without limitation, that [the lender] could change or amend the terms of the Agreement." *Id.* (quoting *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 831 (S.D. Miss. 2001)).

As for *Coates*, the Southern District of Mississippi stated, under similar circumstances, "[c]onsistent with the terms of the original agreement, Bank One could validly amend its agreement to add an arbitration clause, just as it could have amended the agreement to add or change any other term on the agreement." 125 F. Supp. 2d at 831. The court there granted Bank One's motion to compel arbitration where the original cardholder agreement permitted Bank One to unilaterally "change or amend the terms of the Agreement," "Bank One sent a notification of the amendment to all its cardholders, and specifically gave them the option of rejecting the arbitration provision," yet the cardholder failed to reject the arbitration provision. *Id.* at 832–34.[9]

The Eastern District of Virginia reached the same conclusion applying Virginia law. *Gillam v. Branch Banking & Tr. Co. of Va.*, No. 3:17-cv-722, 2018 U.S. Dist. LEXIS 133255 (E.D. Va. Aug. 7, 2018). There, the bank services agreements "contained provisions that allowed BB&T to modify the terms of the [agreement] by providing notice of the change." *Id.* at *3. The court confirmed "[c]ontracts can contain provisions saying that continued use will bind parties to modified contract terms." *Id.* at *7. Because "BB&T updated the [agreement] in 2017 [to include the arbitration clause], [] provided written notice to the plaintiffs," and "reminded them that continued use of their bank accounts would constitute acceptance of the additional terms," the plaintiffs "agreed to arbitrate disputes arising after that time" by continuing to use the accounts. *Id.* at *8.

The Pennsylvania Superior Court of Appeals recently found an arbitration agreement existed under similar circumstances in *Cook v. Philadelphia Federal Credit Union*, 353 A.3d 803, 811 (Pa. Super. Ct. 2026) (finding account holders assented to an arbitration provision where they signed a membership application, agreeing to be bound by the agreement as amended at any time, received a notice of the amendment adding an arbitration provision, and failed to opt out).

The Supreme Court of Alabama came to the same conclusion in *SouthTrust Bank v. Williams*, 775 So. 2d 184 (Ala. 2000). When opening their checking accounts with SouthTrust

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[9] *See also Herrington v. Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1031–32 (S.D. Miss. 2000) (finding "sufficient notification to the plaintiffs of the revisions effectively amended the terms and conditions of the plaintiffs' deposit agreements [to include an arbitration provision] as contemplated when the plaintiffs initially opened their accounts and agreed to such amendments" and finding "the plaintiffs accepted the terms of the arbitration agreement by continuing to utilize their accounts"), *aff'd*, 265 F.3d 1059 (5th Cir. 2001).

Bank, the plaintiffs signed a signature card containing a change-in-terms provision and agreed to be bound by SouthTrust Bank's rules and regulations. *Id.* at 185. SouthTrust Bank later amended its regulations to include an arbitration provision and provided notice to the plaintiffs by including a copy of its regulations in their account statements. *Id.* at 186. The plaintiffs never closed their accounts. *Id.* at 187. Relying on statutes concerning modifications to credit card accounts, as explained more fully below, *see infra* Section I.D, the court found the plaintiffs "continued the business relationship after the interposition of the arbitration provision" and "[i]n doing so, they implicitly assented to the addition of the arbitration provision." *Id.* at 189.[10]

An Illinois appellate court reached a similar conclusion in the unconscionability context. *See Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 894 (Ill. App. Ct. 2003) ("In sum, [the card holders] were on notice that the credit card agreement could be amended by [Sears]. They were sent notice of changes to the agreement, including an amended agreement containing the arbitration provision. The arbitration provision contained a conspicuous paragraph, in capital letters, notifying card holders they were relinquishing their rights to bring claims to court. The card holders also were allowed to opt out of the amendments without causing their balances to become due and payable immediately. Under these circumstances, the addition of the arbitration provision was not procedurally unconscionable.").

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[10] In reaching this conclusion, the Supreme Court of Alabama referenced *Stiles v. Home Cable Concepts*, 994 F. Supp. 1410 (M.D. Ala. 1998). In *Stiles*, the cardholder signed a credit card application, incorporating a cardholder agreement with a change-in-terms provision as permitted by statute. *Id.* at 1412. When the credit company amended the agreement later to include an arbitration provision and provided notice to the cardholder, the cardholder claimed he never assented to the provision though he never opted out of it. *Id.* at 1413–14. The Middle District of Alabama disagreed, finding the cardholder "assented to the contract as a whole in this case" which included the provision that it "may be changed" by the credit company. *Id.* at 1416. By failing to opt out in the time allotted, the cardholder "assented to an arbitration clause, even absent his signature." *Id.* at 1417.

Other jurisdictions enforce unilateral modifications using a change-in-terms provision when they relate back to the "universe of terms in the original agreement." The Supreme Court of North Carolina recently adopted this approach in *Canteen v. Charlotte Metro Credit Union*, following a regularly cited case from California. 900 S.E.2d 890, 892–95 (N.C. 2024) (citing *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273 (Cal. Ct. App. 1988)).[11] In *Canteen*, the court held amendments to an agreement fall within the "universe of terms" of the original agreement if they relate to the "general subject matter which was anticipated when the contract was entered into," and thus were "within the reasonable contemplation of the parties at the time of contract formation." *Id.* at 895. So "if the original agreement includes any provisions to forums or methods for dispute resolution, then a modification to include an arbitration agreement is within the same universe of terms and therefore permissible under a change-of-terms provision." *Id.* at 896; *see also Badie*, 79 Cal. Rptr. 2d at 285 ("What did the Bank's customers consent to when they agreed that the Bank could unilaterally change the terms of their account agreements?").

[11] *See also, e.g.*, *Neal v. Purdue Fed. Credit Union*, 201 N.E.3d 253, 263 (Ind. Ct. App. 2022) ("PFCU and Neal had previous dealings that resulted in the execution of the Account Agreement, which provided that its terms were subject to change at any time, that PFCU would notify Neal of any changes, and that any disputes regarding the agreement would be resolved by legal action in Tippecanoe County. PFCU's offer to change the dispute-resolution portion of the agreement explicitly stated that assent to the Arbitration Provision may be manifested by silence or inaction, and that Neal could opt out of the provision by giving written notice within thirty days without having to close his account. Under these circumstances, we conclude that it was reasonable that Neal should have notified PFCU if he did not intend to accept the offer, and that Neal accepted the offer by remaining silent and inactive past the deadline."); *Larsen v. Citibank FSB*, 871 F.3d 1295, 1308 (11th Cir. 2017) (finding the plaintiff assented to an amended arbitration agreement when he agreed initially to a change-in-terms provision and continued to use his account after amendment); *cf. Follman v. World Fin. Network Nat'l Bank*, 721 F. Supp. 2d 158, 165 (E.D.N.Y. 2010); *Stone v. Golden Wexler & Sarnese, PC*, 341 F. Supp. 2d 189, 198 (E.D.N.Y. 2004) (applying Virginia law, finding "[t]he Court agrees with the *Badie* court that the terms discussed in the change-in-terms clause must supply the universe of terms which could be altered or affected pursuant to the clause"); *Myers v. MBNA Am. & N. Am. Capitol Corp.*, No. 00-163-M-DWM, 2001 U.S. Dist. LEXIS 11900, at *14 (D. Mont. Mar. 28, 2001) (finding "[t]he amendment requiring arbitration is not foreshadowed in the original Agreement").

Here, when opening their accounts with SRP, Plaintiffs agreed to be bound by the Membership Agreement "as amended from time to time" in their Membership Application. Order at 5; *see also, e.g.*, ECF No. 53-5. They also agreed to the unilateral change-in-terms provision, which allowed SRP to "change any term or condition of this Agreement" in its "sole discretion." ECF No. 53-3 at § 34.[12] "[T]he change provision in [the Membership] Agreement was not [] limited and did not refer to any specific types of changes." *Rudolph v. Wright Patt Credit Union*, 175 N.E.3d 636, 647 (Ohio Ct. App. 2021). It included all types of changes to the Agreement, including the modification to the Arbitration Provision at issue.

What is more, SRP gave Plaintiffs ample time to opt out of the Arbitration Provision, without affecting any of their other membership rights, and informed them that "continued use of [their] Credit Union account and services will act as [their] consent to this proposed Arbitration Agreement." ECF No. 53-2. Plaintiffs did not opt out and continued to use their accounts and SRP's services. Courts find this opportunity to opt out significant. *See Lipsett v. Banco Popular N. Am.*, No. 22 Civ. 3901 (VM), 2022 U.S. Dist. LEXIS 222495, at *18–19 (S.D.N.Y. Dec. 9, 2022) ("But, regardless of whether the added provision was the type of term falling within the ambit of the parties' expectation, courts also recognize *Badie* and its progeny as advancing the following more general consideration: whether the unilateral addition of an unexpected term to a contract, that is otherwise inappropriate, is alleviated by affording the customer a meaningful or ample opportunity to opt out of the term."); *Hutcherson*, 793 N.E.2d at 892 (stating "an amendment to a contract adding an arbitration provision is not necessarily invalid, particularly where the

[12] Plaintiffs make the unremarkable statement that these provisions do not change the analysis because "any contract may be 'amended from time to time.'" Pls.' Br. at 7. While it may be true that, depending on specific contract language, a contract may be amended, it is not also true that every party to a contract agrees to be bound by modifications. But Plaintiffs did.

customer is given the option to 'opt-out' of the amendment and fails to do so"); *cf. Rudolph*, 175 N.E.3d at 649 (noting "while WPCU did not offer an option to 'opt out' of arbitration, [the consumer] could have terminated his account and gone to another bank if he did not like the account terms").

B. *Lampo* does not control because Plaintiffs expressly agreed to future amendments in an ongoing, at-will credit union relationship.

The certified questions arise in a consumer financial relationship, not an employment relationship. *See, e.g.*, *SouthTrust,* 775 So. 2d at 188 (finding the checking account agreement "involve[d] at-will, commercial relationships, based upon a series of unilateral transactions"); *Land v. IU Credit Union*, 226 N.E.3d 194, 196 (Ind. 2024) ("It would certainly be fair to characterize the [business] relationship between [the consumer] and [the credit union] as an 'on-going, at-will, consumer-business relationship.'").

Plaintiffs primarily rely on *Lampo*. But *Lampo* concerned an employment contract and did not include any agreed-on change-in-terms provision. And contracts in this consumer context differ significantly from the employment context. In fact, "the differences between the two contexts suggest that employer change-of-terms provisions should be subject to even greater scrutiny than those found in consumer agreements." Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 BOSTON COLL. L. REV. 427, 501 (2016).

Here, Plaintiffs are owners and voting members of SRP,[13] who may terminate their memberships in the cooperative association at any time, and for any reason or no reason at all.

[13] A federal credit union is a cooperative association chartered under the Federal Credit Union Act and regulated by the National Credit Union Administration ("NCUA"). Federal credit unions provide savings, loans, and other banking services to their members, and send profits back to them through better rates and lower fees. Its "purpose" is to "promot[e] thrift among its members and creat[e] a source of credit for provident or productive purposes." 12 U.S.C. § 1752(1).

ECF Nos. 53-1 & 53-3 at § 25. Nothing prohibits them from ending their relationship with SRP or forming relationships with other credit unions or banks. *See also* Arnow-Richman, *supra* at 501 (stating "consumers are also capable of finding replacement providers with minimal transaction costs"). And in other consumer contexts, "[c]reditworthy consumers can hold multiple credit cards, hedging the possibility that one issuer might alter its terms unfavorably." *Id.*

Most of the time, however, employees hold only one job at a time, on which their livelihood hinges, and "[c]hanges in terms affect" that livelihood because "the risks of exit in seeking alternate work are enormous." *Id.* at 502. Understandably, the Court in *Lampo* considered the modification to the employment agreement in that context important in its analysis. *See* 445 S.C. at 316–17, 914 S.E.2d at 145 (expressing concerns about how to "keep an employer from using the opt-out procedure to accomplish other changes in an employment contract" and "wonder[ing] whether an employer may force other unacceptable changes, such as an employer self-insured for medical benefits using an employee's silence in the face of an opt-out notice to reduce the employer's exposure for paying major medical expenses").

To be sure, South Carolina public policy counsels in favor of treating unagreed to, unilateral modifications by an employer differently from the context here, where an at-will, voting federal credit union member has agreed to allow SRP to unilaterally amend the terms of the members' credit union relationship. *Cf. Fleming v. Borden*, 316 S.C. 452, 462, 450 S.E.2d 589, 595 (1994) (adhering to the "strong equitable and social policy reasons militating against allowing employers to promulgate for their employees potentially misleading personnel manuals while reserving the right to deviate from them at their own caprice. . . . Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory." (internal citations and quotation marks omitted)); *see also Hall v. UBS Fin. Servs.*, 435 S.C. 75, 85, 866 S.E.2d 337, 341–42 (2021) ("All at-will employment relationships, whether they are memorialized in a written contract stipulating the at-will nature of the employment or orally formed simply out of circumstance, are contractual relationships. When an employer offers to pay an employee to perform a service for a price and the employee performs that service, a contract is formed.").

In certifying the first question to this Court, the district court understandably considered this Court's recent decision in *Lampo* because "[a]t first glance" the decision appeared to apply. Order at 28. But a closer examination confirms that *Lampo* did not—and on its materially different facts could not—resolve the question presented here. Importantly, the unilateral modification clause here was *not* at issue in *Lampo*. Because *Lampo* did not involve an agreed change-in-terms provision, the Court had no occasion to decide whether such a provision would alter the analysis. *See Thompson v. Killian*, 447 S.C. 177, 190 n.5, 924 S.E.2d 606, 613 n.5 (2025) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked" (alteration in original) (citation omitted)). As the district court foreshadowed, Order at 28–29, unlike the circumstances in *Lampo*, "other circumstance[s exist here] . . . mak[ing] it imperative that [Plaintiffs] opt out or be deemed to have accepted," 445 S.C. at 316, 914 S.E.2d at 145, and the analysis in *Lampo* in fact counsels in favor of answering the first certified question "yes."

In *Lampo*, the Court considered whether an employee agreed to an arbitration provision added to the terms of employment, after she had already begun working, by failing to opt out. 445 S.C. at 313, 914 S.E.2d at 143. The Court found she did not. *Id*. at 317, 914 S.E.2d at 145. Critically, the Court explained that it could "imagine that silence and inaction may be a manifestation of assent in other circumstances." *Id.* at 315, 914 S.E.2d at 145. In doing so, the

Court looked to the Restatement (Second) of Contracts for guidance, which provides that silence in the face of an offer may establish a manifestation of assent to the offer in three situations. *Id.* The latter two apply here: "[w]here 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 "[w]here 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 315, 914 S.E.2d at 145 (quoting Restatement (Second) of Contracts § 69 (AM. L. INST. 1981)).

The Membership Agreement governs a highly regulated and ever-evolving cooperative association credit union relationship. In becoming voting members and owners of SRP, Plaintiffs expressly agreed to be bound by the Membership Agreement "as amended from time to time." SRP gave Plaintiffs advance notice of the modification to the Arbitration Provision, the right to opt out without consequence to any other membership rights, and informed them the failure to do so and continued use of their SRP accounts would constitute acceptance of the modified provision. *E.g.*, ECF No. 53-2 & 53-5. These circumstances undoubtedly gave Plaintiffs reason to understand that silence and continued use would constitute assent and made it reasonable for them to notify SRP if they rejected the amendment. *Lampo*, 445 S.C. at 315, 914 S.E.2d at 145.

Those circumstances were absent in *Lampo*. This case therefore presents the very "other circumstances" *Lampo* recognized may permit silence and inaction to manifest assent. Plaintiffs expressly agreed to future amendments, received notice that continued use without opting out would constitute acceptance, and continued using their accounts without opting out. Their conduct therefore manifested assent to the amended Arbitration Provision.

C. The Restatement of Consumer Contracts confirms that notice, a penalty-free opportunity to opt out, and continued use establish an effective consumer-contract modification.

In *Cornell v. Desert Financial Credit Union*, the Supreme Court of Arizona addressed certified questions arising in circumstances remarkably similar to those presented here. 524 P.3d 1133 (Ariz. 2023).[14] As part of opening checking and savings accounts with Desert Financial Credit Union ("Desert Financial"), members agreed to terms and conditions, including a change-in-terms provision. *Id.* Later, Desert Financial added a mandatory arbitration clause and notified its members of the change as well as the ability to opt out. *Id.* at 1136. As here, the central question was whether consumers assented to an arbitration provision added through a conge-in-terms process after receiving notice and an opportunity to opt out. *Id.*

In answering the certified questions before it, the Supreme Court of Arizona distinguished the consumer context from the at-will employment context. The court rejected the consumer's likening of the contexts, stating:

> [the consumer's] and Desert Financial's business relationship consists of day-to-day unilateral contract offers and acceptances. Like the at-will bank patrons in *SouthTrust Bank*, [the consumer] was free to terminate her accounts with Desert Financial at any time and vice versa. This materially differs from . . . [a] modification of a bilateral employment contract whose original terms did not expressly provide for unilateral modification.

Id. at 1137–38. The court nevertheless recognized that existing contract principles did not fully address what protections should accompany unilateral modifications in ongoing consumer

[14] 524 P.3d at 1135 ("(1) Does an effective modification of a consumer contract occur when the offeror sends notice of the proposed modification to the offeree, through a communication channel to which the offeree previously consented, even if the offeree fails to respond?; and (2) If not, what additional showings (such as actual receipt of the notice of proposed modification, subjective understanding of the proposed modification, or affirmative consent to the proposed modification) are necessary to achieve an effective contract modification in this circumstance?").

relationships. The court therefore adopted the recently effective Restatement of the Law, Consumer Contract ("RCC"), which the district court also considered here, Order at 29–30.

Section 3(a) of the RCC provides that "modification of a standard contract term" is valid if the business shows:

> (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
>
> (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 the Law, Consumer Contracts § 3 (AM. L. INST. 2024).

The considerations that led *Cornell* to adopt the RCC are equally persuasive under South Carolina law and public policy and particularly well suited to the ongoing credit-union relationship at issue here.

First, the RCC aligns with *Lampo*. As *Lampo* recognized, silence and inaction "may be a manifestation of assent in other circumstances." 445 S.C. at 315, 914 S.E.2d at 145. The RCC identifies circumstances in which such assent is reasonable—including where, as here, the consumer receives notice of the proposed modification, a meaningful opportunity to opt out without altering the existing relationship, and notice that continued use will constitute acceptance. *See supra* Sections I.A–B.

Second, it "permits businesses to readily update their terms, which facilitates economic efficiency in the context of standardized contracts." *Cornell*, 524 P.3d at 1140; *see also Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395–96, 498 S.E.2d 898, 902 (Ct. App. 1998) ("standardization of forms for contracts is a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations" (quoting *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007, 1015 (M.D. Ala. 1997))); *Land*, 226 N.E.3d at 197 ("And we recognize the practical difficulties that businesses may face in securing affirmative consent to contract modifications from existing customers.").

That flexibility is particularly important for SRP because the legal and regulatory requirements governing federal credit unions change over time, while SRP's relationships with its member-owners are intended to endure. S*ee generally* 12 U.S.C. § 1751 *et seq.*; 12 C.F.R. § 700 *et seq.*[15] SRP is subject to regulatory guidance issued by the NCUA, which regularly "provide[s] guidance and other information to the credit union system on regulatory and supervisory matters, trends affecting federally insured credit unions and potential risks and threats." Regulation and Supervision, Letters to Credit Unions and Other Guidance, NAT'L CREDIT UNION ADMIN. *available at* https://ncua.gov/regulation-supervision/letters-credit-unions-other-guidance (last visited Aug.

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[15] *See also* ECF No. 53-3 at 3 (providing "Applicable Laws" shall include: "(i) Visa U.S.A. Inc. Bylaws, Visa U.S.A. Inc. Operating Regulations, Visa U.S.A. Inc. Certificate of Incorporation, Visa International Bylaws, and Visa International Operating Regulations; (ii) NACHA's (The National Automated Clearing House Association) Operating Rules; (iii) the Operating Regulations of any network through whom you initiate or process any transaction(s); and (iv) any and all laws, treaties, rules, regulations, or regulatory guidance of the government of the United States, as the same may be amended and in effect from time to time; and you agree that such Applicable Law shall govern despite any other general or specific terms or conditions set forth in the entirety of this Agreement.").

20, 2026). Because SRP operates amid ongoing changes in regulatory and market conditions, it needs the flexibility to revise account terms in a timely manner with appropriate notice.

Third, the RCC "simplifies business operations and reduces transaction costs to the advantage of all parties concerned. It makes little sense to require parties to quit their at-will relationship just to immediately resume it with additional terms." *Cornell*, 524 P.3d at 1140; *see also Cicle v. Chase Bank USA*, 583 F.3d 549, 555 (8th Cir. 2009) (holding that a cardholder who had ample time to opt out but continued using the card "affirmatively accepted the amendment" under the terms of the notice).

Fourth, it "imposes several safeguards to protect consumers from unfair exploitation. For example, businesses must propose modifications in good faith, and new terms cannot undermine negotiated parts of the original bargain." *Cornell*, 524 P.3d at 1140. "Consumers also must receive reasonable notice that their failure to opt out of proposed modifications constitutes acceptance, and they must be given a reasonable opportunity to opt out without penalty." *Id.*

Those safeguards were present here. Plaintiffs could opt out of the Arbitration Provision without affecting any other right or obligation under the Membership Agreement, yet they did not do so. Nor did Plaintiffs challenge the Arbitration Provision as substantively unconscionable or contrary to public policy. Further, Plaintiffs can always terminate the Membership Agreement at any time and for any reason. ECF No. 53-3 at § 25. Taken together, the Membership Agreement, applicable law, [16] the penalty-free opt-out right, and the competitive market protections identified in *Canteen* make the RCC particularly instructive here. *Canteen*, 900 S.E.2d at 896 ("While lay consumers may not understand every legal intricacy involved in the contractual process with

[16] *See* 12 U.S.C. § 1751 *et seq.* (Federal Credit Union Act); 12 C.F.R. § 700 *et seq.* (Regulations Affecting Credit Unions); S.C. Code Ann. § 37-1-101 *et seq.* (South Carolina Consumer Protection Code); S.C. Code Ann. § 39-5-10 *et seq.* (South Carolina Unfair Trade Practices Act).

companies, the market provides a way for consumers to respond to policies with which they disagree. As needs arise, competitor companies can provide alternatives for consumers, forcing improvements or updates to products or services, including terms to satisfy consumers' desires.")

While the Court need not formally adopt the RCC to answer the first certified question, its framework provides useful, context-specific guidance for modifications in an ongoing consumer financial relationship like the one here.[17]

D. South Carolina consumer protection statutes confirm that financial agreements may be modified upon proper notice—even when the original agreement did not authorize the change.

South Carolina consumer protection statutes independently support answering the first certified question, "Yes." Sections 37-2-416 and 37-3-408 of the South Carolina Code expressly authorize a lender to change the terms of an initial agreement, even if the change was not authorized by the initial agreement, upon proper notice to the consumer. *See* S.C. Code Ann. § 37-2-416 ("Change in terms of revolving charge accounts."); S.C. Code Ann. § 37-3-408 ("Change in terms of revolving loan accounts."). Like the Supreme Court of Alabama in *SouthTrust*, 775 So. 2d 184, the Court should consider these statutes useful under the circumstances here.

In *SouthTrust*, the court emphasized that the plaintiffs "continued the business relationship after the interposition of the arbitration provision" which showed assent to the arbitration provision. *Id.* at 189. That conduct, the court found, "is precisely [the] kind of acquiescence that forms the basis for the implicit assent to modification of a *credit-card-account* term," which is

[17] As Plaintiffs' own exhibits reflect, the opposition preceding the ALI's adoption of the RCC came from banking interests, not consumer groups—and concerned provisions other than the modification rule at issue here. Ex. A to Pls.' Br.

expressly permitted by Alabama statute.[18] *Id.* at 190. The court found the statute relating to modifications to credit card account agreements "differ[ed] in no material respect" from the change-in-terms provision SouthTrust employed in its account opening documents. *Id.* "In other words, it expressly provided that original agreement may be amended by the lender, based upon the apparent acquiescence of the cardholder, with or without a change-in-terms clause such as the ones involved in this case." *Id.* Those "[a]mendments to the conditions of unilateral-contract relationships with notice of the changed conditions are not inconsistent with the general law of contracts," so the plaintiffs "implicitly assented to be bound by the arbitration provisions by holding open their accounts after notice of the amendment." *Id.* at 190–91.

In South Carolina, just as in Alabama and many other states, the General Assembly has expressly authorize unilateral changes to revolving charge and loan agreements upon prescribed notice, *see* S.C. Code Ann. § 37-2-416; S.C. Code Ann. § 37-3-408, "that differ[] in no material respect from the one [SRP] followed in this case," *SouthTrust*, 775 So. 2d at 190. "In other words,

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[18] Many other jurisdictions allow the addition of an arbitration clause pursuant to a change-in-terms provision, relying in part on state-specific statutes authorizing banks or credit card companies to unilaterally change the underlying agreement governing revolving credit plans. *See, e.g.*, *Ward v. Discover Bank*, No. 3:19-CV-02124-SAL, 2020 WL 1922908, at *14–15 (D.S.C. Apr. 21, 2020) (compelling arbitration against plaintiffs who did not initially agree to arbitration but whose contracts contained a change in terms clause, stating "[i]n Delaware, the amendments at issue are expressly permitted by statute" which "allows a credit card issuer to unilaterally amend its contracts with customers to include an arbitration provision on an opt-out basis"); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 915 (N.D. Tex. 2000) (applying Delaware law and finding the arbitration provision was added to the cardmember agreement through a change of term provision under Delaware statute and because the plaintiffs received notice of the addition of the arbitration provision and failed to opt out, "each Plaintiff was statutorily and contractually bound by a valid amendment by virtue of the use of the credit card"); *Joseph v. M.B.N.A. Am. Bank, N.A.*, 775 N.E.2d 550, 553 (Ohio Ct. App. 2002) (citing Delaware statutory law permitting the addition of the arbitration provision stating "[t]he ability to amend a credit card agreement is subject to an 'opt-out' availability that permits the card holder the choice whether to accept the amendment. *See* Del. Code Ann. Title 5, Sections 952(b)(2) and (5). The opt-out availability has been held valid as a means of enforcing the ability to amend the credit card agreement.").

[the Change-in-Terms Provision here] expressly provided that original agreement may be amended by the lender, based upon the apparent acquiescence of the cardholder, with or without a change-in-terms clause such as the ones involved in this case." *Id.*; *see also Coates*, 125 F. Supp. 2d at 831 (finding important in a similar context that "Ohio Banking statutes specifically authorize amendments, stating that, 'subject to any requirements under applicable federal law, a bank and a borrower may specify in their agreement any terms and conditions for modifying or amending the agreement'"). Federal regulations also allow financial institutions to amend certain terms with notice. 12 C.F.R. § 1005.8.

The statutory approach also makes practical sense in the cooperative association credit-union context. SRP's members are both customers and member-owners of the credit union. *See* ECF No. 53-3 at ¶5 ("Upon approval of your membership application and the deposit of any required shares, you become a 'member-owner' of this Credit Union. As a 'member-owner' you are eligible to apply for all Credit Union deposit, loan and other financial services; and you may vote at all annual or special meetings of the membership if you are 16 years of age or older."). And SRP's membership agreements are for an indefinite period. Indeed, most Plaintiffs here, claiming they cannot have assented to the Arbitration Provision in the 2021 or 2023 Membership Agreements, have been voting members of SRP for decades and subject to versions of the arbitration provisions in the Membership Agreements existing before the 2021 and 2023 amendments.

This context matters because the credit union relationship is ongoing, collective, and governed by a uniform membership agreement that applies across the entire membership base. Unlike other negotiated contracts, membership agreements must be administered consistently across SRP's 195,000 members. Order at 4. SRP must be able to adapt its Membership Agreement over time to changes in market conditions, law and regulation, technology, and consumer practices. The change-in-terms provision supplies that necessary flexibility. *See* 17A AM. JUR. 2D *Contracts* § 496 ("Parties to a contract are not forever locked into its terms, but have the right to amend their contract by mutual consent."); *see also Stone*, 341 F. Supp. 2d at 198 ("To be sure, flexibility is important to the credit industry, since credit card companies are parties to long-term contracts with countless customers. Requiring companies to obtain explicit consent to every change in the interest rate or finance charge would significantly burden the industry. This is precisely the type of flexibility permitted by the Bank's change-in-terms provision, which allows unilateral changes or additions concerning periodic rates, fees, and other financial aspects of the contract.").

Without an effective mechanism for modifying account terms, credit unions could be forced to obtain new agreements from large numbers of existing members whenever material changes to the banking relationship became necessary. Requiring this to unfold with each new material law or regulation, law, technology, or other circumstances would be cumbersome and costly. *See Canteen*, 900 S.E.2d at 896 ("Given the nature of the modern economy, change-of-terms provisions are a necessary and efficient way for companies to update contractual provisions without canceling accounts and renegotiating contractual terms every time modification may be required.").

SRP members receive the benefits of a continuing relationship when agreeing at its outset that the Membership Agreement may be amended from time to time in accordance with its terms and applicable law. SRP includes a notice to such effect in its Membership Agreements.[19]

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[19] *See* ECF No. 53-5 at 2 ("Special Note: Your relationship with the Credit Union is also governed by state and federal laws, which may change from time to time. The body of law is too large and complex to be reproduced here. . . . **By signing a Membership Application and Account Card or your use or continued use of any account or account services after receiving this Agreement, notice of its availability or notification of any change in terms, you, jointly and**

In sum, the overwhelming weight of authority holds that, where a consumer agrees to a change-in-terms provision, receives notice and an opportunity to opt out, and continues the relationship without opting out, the consumer manifests assent to the amendment. Pursuant to this authority, including the RCC and South Carolina's consumer-protection statutes, the Court should answer first certified question, "Yes." Plaintiffs manifested assent by (1) agreeing to be bound by the Membership Agreement "as amended from time to time"; (2) receiving advance notice of the amended Arbitration Provision, a penalty-free opportunity to opt out, and express notice that continued use without opting out would constitute acceptance; and (3) continuing to use their accounts without opting out.

II. The Court should decline to answer the second certified question under Prima Paint; alternatively, the Membership Agreement is not illusory because SRP's modification authority is subject to express and implied limitations.

The Court should not reach the second certified question under *Prima Paint*. Plaintiffs' argument that the Membership Agreement is illusory challenges the Membership Agreement as a whole, not the Arbitration Provision specifically. Under Prima Paint and the severability doctrine, once the Court determines that the parties agreed to arbitrate, that broader challenge to the Membership Agreement is for the arbitrator. *See infra* Section II.A. Accordingly, if the Court answers the first certified question "Yes," it should decline to answer the second.

If the Court nevertheless reaches the second question, it should answer **"Yes."** The Membership Agreement is not illusory because SRP's authority to modify it is not unlimited. SRP's authority is constrained by the Agreement's own terms, South Carolina common law—including the implied covenant of good faith and fair dealing—and applicable federal law. Those express

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severally, agree that you understand and agree to the terms and conditions stated in this Agreement, the Schedule and the Rate Sheet as amended from time to time.").

and implied limitations prevent SRP's performance from being entirely optional and therefore foreclose Plaintiffs' contention that the Membership Agreement was illusory from its inception. *See infra* Sections II.B–D.

The facts here reinforce this conclusion. Plaintiffs focus on the phrase "without notice" in the change-in-terms provision to argue that SRP could modify the Membership Agreement without limitation and that the entire Agreement therefore must be void. But phrase "without notice" cannot be read in isolation, and Plaintiffs' hypothetical bears little resemblance to what occurred here. SRP provided Plaintiffs advance notice of the amendment to the existing Arbitration Provision, gave them a meaningful opportunity to opt out without affecting their other membership rights, and expressly advised them of the consequences of failing to do so. Plaintiffs nevertheless ask the Court to disregard those facts and invalidate the entire Membership Agreement based on the possibility that SRP might exercise its modification authority without notice in some other circumstance. *See* Pls.' Br. at 17.

Neither the Agreement nor the law gives SRP such unfettered discretion. The change-in-terms provision expressly incorporates the requirements of applicable law; the Agreement addresses the notice required when applicable law supplies no express time; South Carolina law imposes the covenant of good faith and fair dealing; and federal law further regulates when and how financial institutions may modify account terms. Thus, even apart from *Prima Paint*, Plaintiffs' premise is incorrect: SRP's modification authority is subject to meaningful contractual and legal constraints, and the Membership Agreement is not illusory.

A. Under *Prima Paint*, Plaintiffs' challenge to the validity of the Membership Agreement as a whole is for the arbitrator, not the Court.

Plaintiffs now claim—for the first time[20]—that a contract was never formed with SRP because the modification clause in the Membership Agreement rendered the contract illusory. *See* Pls.' Br. at 12 (arguing the implied covenant cannot save contracts that were never formed). This position is difficult to reconcile with Plaintiffs' collective decades-long receipt of SRP's services under the Membership Agreement. More importantly, however, Plaintiffs' argument confirms that their challenge is directed to the Membership Agreement as a whole.

In *Prima Paint v. Flood & Conklin Manufacturing Co.*, the Supreme Court adopted the severability doctrine, under which "arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded." 388 U.S. 395, 402 (1967). "Since *Prima Paint*, courts have generally recognized two types of challenges to arbitration: (1) challenges to the validity of the . . . contract as a whole[,] and (2) challenges to the validity of the arbitration provision contained in the contract." *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 385–86, 892 S.E.2d 112, 116 (2023). "Under the *Prima Paint* doctrine, the arbitrator decides the first type of challenge, and the court decides the second type." *Id*. Thus, while the Court may determine whether the parties formed a valid arbitration agreement, *Prima Paint* precludes it from deciding whether the Membership Agreement as a whole is illusory because of its unilateral modification clause.

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[20] Plaintiffs' current argument is much broader than the one originally raised to the district court. Before the district court, Plaintiffs argued the change-in-terms provision and related arbitration amendments were void for illusoriness, not the entire contract. The district court noted as much. *See* Order at 31 n.14. Plaintiffs broader argument seeks to avoid the effect of implied covenant of good faith and fair dealing existing in every contract.

In *Prima Paint*, the petitioner alleged the respondent fraudulently induced it to enter a contract containing an arbitration provision. *Id*. at 397–98. The challenge there was not to the arbitration provision, specifically, but to the contract as a whole. *Id.* The petitioner claimed the contract was void, and so, by extension, the arbitration provision was too. *Id*. In applying the severability doctrine, the *Prima Paint* Court held that:

> If the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the making of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

Id. at 403–4. "The takeaway from *Prima Paint* is that the scope of the challenge to a party's right to invoke arbitration is *critical*." *Sanders*, 440 S.C. at 385, 892 S.E.2d at 116 (emphasis added). A challenge to the contract as a whole is for the arbitrator, but a challenge to the validity of the arbitration provision is for the court. *Id*. at 387, 892 S.E.2d at 117.

In considering the second certified question, Plaintiffs do not challenge the validity of the Arbitration Provision. Rather, they challenge the Membership Agreement's modification clause, claiming it is so illusory that a contract never existed between the parties. That challenge is precisely the type of contract-wide validity challenge governed by *Prima Paint*. Once this Court resolves the formation questions presented by the first certified question, the severability doctrine required the arbitrator to decide whether the modification provision renders the Membership Agreement as a whole unenforceable.[21]

[21] Because Plaintiffs proffered a much narrower illusory argument before the district court, the district court did not have an opportunity to fairly apply the *Prima Paint* doctrine here.

B. Courts construe contracts to avoid illusory promises and to give effect to the parties' intended agreement.

Even if illusoriness is an issue for this Court, settled contract principles favor a construction that gives effect to the parties' intended agreement rather than one that renders their promises illusory. *See M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 440 (2015) (courts must "avoid construction of contracts that would render promises illusory because such promises cannot serve as consideration for a contract"); *see also* 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.").

South Carolina strongly protects freedom of contract. Parties "may bind themselves as they see fit by contract, unless the contract would violate the law or is contrary to public policy," and courts must "construe and enforce contracts as written." *M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. at 657, 667 S.E.2d at 14. Courts therefore "assume the parties intended a meaningful agreement" and, where reasonably possible, give effect to the agreement as a whole. *Herrington v. SSC Seneca Operating Co., LLC*, 435 S.C. 243, 248, 866 S.E.2d 579, 582 (Ct. App. 2021). In that same vein, courts normally enforce contractual limitations to which parties agreed. *Maybank v. BB&T Corp.*, 416 S.C. 541, 787 S.E.2d 498 (2016) ("When a contract is entered into freely and voluntarily, contractual limitations are *normally enforced*." (emphasis added)). These principles favor a construction that gives effect to the Membership Agreement rather than one that renders it void from inception.

C. Plaintiffs' no-notice theory fails on the undisputed facts because SRP provided actual advance notice and a meaningful opportunity to opt out.

Plaintiffs ask the Court to void the Membership Agreement for illusoriness based on a strained interpretation of the change-in-terms provision, arguing SRP may amend any part of the

Agreement "without notice." But whatever hypothetical concerns Plaintiffs raise about amendments without notice, that is not what occurred here. SRP provided advance notice of the challenged amendment, and Plaintiffs had ample time to opt out of the Arbitration Provision or terminate their memberships if they disagreed with the change.

As the district court correctly found, SRP provided notice of the subject amendments before their effective date and Plaintiffs received that notice. *See* Order at 25 ("[T]he court finds no genuine dispute that [Plaintiffs] received the 2021 notice."). Specifically, in June 2021, SRP provided a one-page notice to all members summarizing amendments to the Membership Agreement. *See id*. at 5. One of the amendments was to a preexisting arbitration provision.[22] The notice stated—in bold—that the amended Arbitration Provision would take effect August 1, 2021, more than a month after the notice was sent. Members then had until September 15, 2021—another forty-five days—to opt out. No Plaintiff opted out, despite contending now that they would have done so.[23]

Even though SRP provided notice, Plaintiffs contend the Membership Agreement's modification clause is illusory because SRP may change "any term or condition of this Agreement . . . at any time without notice except as expressly required by applicable law." Pls.' Br. at 2. Plaintiffs' focus on the words "without notice" in that sentence overlooks both the remainder of the provision and the undisputed fact that SRP provided actual advance notice here.

[22] The notice also identified at least eight other amendments, ranging from the use of biometrics/fingerprints with accounts, to amendments related to natural disasters and pandemics like COVID-19, to clarifying language regarding the handling of "Term Share Certificate Accounts for Deceased Members." *Id*.

[23] While the 2021 Notice made substantive modifications to the existing arbitration provision, and is the primary subject of Plaintiffs' challenge, SRP also amended the Arbitration Provision in 2023 and similarly provided advance notice of that and other changes.

Plaintiffs even urge this Court to refrain from examining the underlying record establishing that notice. Pls.' Br. at 17–18. SRP does not ask this Court to enforce a unilateral right to amend without notice. Rather, SRP asks the Court to follow the majority rule by enforcing modification clauses and accompanying amendments when notice of the amendment is given before its effective date.

D. The Membership Agreement is not illusory because SRP's modification authority is constrained by the Agreement and by applicable law.

SRP does not possess an unfettered right to modify the Membership Agreement. Its modification authority is constrained by the Agreement itself, South Carolina common law—including the implied covenant of good faith and fair dealing—and applicable federal law.

An illusory promise makes "performance *entirely* optional with the promisor." Restatement (Second) of Contracts § 77 cmt. a (emphasis added); *see also Canteen*, 900 S.E.2d at 897 (defining an illusory promise as one where the promisor maintains "an *unlimited* right to determine the nature and extent of the performance" (emphasis added)). Promises that "impose no obligation . . . cannot serve as consideration." 3 WILLISTON ON CONTRACTS § 7.7 (4th ed. 2025).

However, a promise is *not* illusory when it "*is tempered by its terms, express or implied*." *Jenkins v. CitiFinancial, Inc.*, No. 2:05-1199-PMD-GCK, 2007 U.S. Dist. LEXIS 107874, at *19 (D.S.C. Jan. 16, 2007) (emphasis added) (citing WILLISTON ON CONTRACTS § 7:7). When express or implied limitations are imposed on the promisor in the performance of a promise, the promise is not illusory. *See, e.g.*, *Harris v. TAP Worldwide, LLC*, 203 Cal. Rptr. 3d 522, 533 (Cal. Ct. App. 2016) ("[T]he fact that one party reserves the implied power to terminate or modify a unilateral contract is not fatal to its enforcement, if the exercise of the power is subject to limitations, such as fairness and reasonable notice."). Importantly, "[the] limitation imposed on a promiser's freedom of choice need not be stated in words. It may be an implicit term of the promise, *or it may be supplied by law*." Restatement (Second) of Contracts, § 77, cmt. d. (emphasis added).

i. The Membership Agreement itself requires advance notice when applicable law does not specify a notice period.

The parties freely entered into the Membership Agreement containing the change-in-terms provision. The change-in-terms provision contains the following notice requirement: "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." ECF Nos. 53-1 & 53-3, at § 34. In this context, if neither statutory nor common law sets a specific notice period, the Membership Agreement states that at least ten days will be sufficient. Here, SRP provided over thirty days' notice before the amendment went into effect on August 1, 2021. And SRP also provided another forty-five days from the effective date for members to opt out of the Arbitration Provision. That express limitation on SRP's modification authority independently weighs against any finding of illusoriness.

Furthermore, at the time of contracting with SRP, Plaintiffs were immediately vested with substantive rights and privileges unique to credit unions and their members. Each Plaintiff had the right to "vote at all annual or special meetings" and was a "member-owner" of SRP, *see* ECF Nos. 53-1 & 53-3, at § 5. Plaintiffs could also terminate their membership at any time, for any reason. *See* ECF Nos. 53-1 & 53-3, at § 25 ("You may terminate a single party account at any time by notifying us in writing."). Conversely, SRP may terminate an account only "for cause" as outlined in the Membership Agreement. *Id*. These rights impose meaningful obligations on SRP and belie Plaintiffs' contention that SRP's performance under the Membership Agreement was entirely optional.

ii. South Carolina common law—including the implied covenant of good faith and fair dealing—limits SRP's exercise of its modification authority.

South Carolina common law, including the implied covenant of good faith and fair dealing, imposes additional limitations on SRP's exercise of its modification authority and further defeats Plaintiffs' illusoriness argument.

First, reasonable notice is a recognized limitation on the exercise of unilateral modification authority in common law, and SRP provided advance notice here. *See Fleming*, 316 S.C. at 463, 450 S.E.2d at 595 (stating "the implied contract of employment created by an employee handbook may be modified by a subsequent employee handbook. To be effective, however, the employee must have reasonable notice of the modification"); *Meadows v. Cebridge Acquisition, LLC*, 132 F.4th 716, 728 (4th Cir. 2025) ("The unilateral right to modify a contract, including an arbitration agreement, does not render an underlying promise illusory if the modifying party must give reasonable notice of modification." (applying West Virginia law)); *cf. Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939 (4th Cir. 1999) (finding, under South Carolina law, an agreement unenforceable where Hooters reserved the right to modify the rules "without notice"); *Doe v. Furman Univ.*, No. 6:24-cv-06193-DCC, 2026 U.S. Dist. LEXIS 13083, at *44–45 (D.S.C. Jan. 22, 2026) ("[C]ourts applying South Carolina law have consistently found an agreement is unenforceable when it contains a unilateral change-in-terms provision without limiting the empowered party in some way, such as by requiring notice be given to the other party.").

Specific to arbitration clauses, courts around the country have enforced amendments when notice of the amendment precedes its effective date. *See Canteen*, 900 S.E.2d at 895 (N.C. 2024); *Stiles*, 994 F. Supp. 1410 (M.D. Ala. 1998); *Coates*, 125 F. Supp. 2d 819 (S.D. Miss. 2001); *Marsh*, 103 F. Supp. 2d 909 (N.D. Tex. 2000); *Herrington*, 113 F. Supp. 2d at 1031 (S.D. Miss. 2000).

The Colorado Court of Appeals similarly rejected an illusoriness challenge to an arbitration provision added to a credit union's membership agreement in *Macasero v. ENT Credit Union*, 533 P.3d 982, 991–92 (Colo. Ct. App. 2023). In that case, the parties' original contract contained a unilateral modification clause. Later, the credit union amended the agreement to add an arbitration provision while providing its members an opportunity to opt out, as SRP did here. The Colorado court found the amendment was not illusory, stating "[i]f the right to make unilateral material and adverse changes to an agreement is 'conditioned upon prior notice and the user's right to reject those changes by cancelling their service,' an arbitration provision is not 'illusory or unenforceable on that basis.'" *Id*. (citing *Vernon v. Qwest Comuns. Int'l, Inc.*, 857 F. Supp. 2d 1135, 1156 (D. Colo. 2012)). In so holding, the Colorado court cited several other decisions enforcing amendments to consumer agreements in a like manner. *Id*. (citing *Coates*, 125 F. Supp. 2d at 826, *aff'd*, 34 F. App'x 964 (5th Cir. 2002); *In re Facebook Biometric Info. Priv. Litig.*, 185 F. Supp. 3d 1155, 1167 (N.D. Cal. 2016); *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574, 576-79 (W.D.N.C. 2000)).

Importantly, South Carolina courts have long recognized in every contract an implied covenant of good faith and fair dealing, *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966). That covenant supplies precisely the type of implied limitation that prevents contractual discretion from being unlimited.

The very purpose of the implied covenant is "to govern the manner in which parties to a contract enforce their existing contractual rights and carry out their existing contractual duties—express or implied." *Rd., LLC v. Beaufort Cnty.*, 443 S.C. 11, 24, 902 S.E.2d 366, 372 (2024). South Carolina courts recognize "it would be virtually impossible for a contract to encompass all of the many possibilities which may be encountered by the parties," and that "neither law, nor equity, requires every term or condition to be set forth in a contract." *Columbia E. Assocs. v. Bi-*

Lo, Inc., 299 S.C. 515, 520, 386 S.E.2d 259, 262 (Ct. App. 1989). Therefore, "the law will imply an agreement to do those things that according to reason and justice should be done to carry out the purpose for which the contract was made." *Id*; *see also Howard v. IOMAXIS, LLC*, No. 18 CVS 11679, 2022 WL 17451249, at *6 (N.C. Bus. Ct. Dec. 5, 2022) (noting, functionally, the covenant serves as a "gap filler" to guide the parties in their performance of the express terms of the contract). The implied covenant is therefore part of the parties' contractual relationship; South Carolina courts treat it as "merely another term of the contract at issue." *Rotec Servs. v. Encompass Servs.*, 359 S.C. 467, 472, 597 S.E.2d 881, 884 (Ct. App. 2004) (citing *Boddie-Noell Props. Inc. v. 42 Magnolia P'ship*, 352 S.C. 437, 444, 574 S.E.2d 726, 730 (2002)).

The implied covenant is precisely the type of limitation on contractual discretion that prevents a promise from being illusory. The Restatement confirms that a limitation on a promisor's discretion need not be express; it may be an "implicit term of the promise" or may be "supplied by law." Restatement (Second) of Contracts § 77 cmt. d. ("A limitation on the promisor's freedom of choice need not be stated in words. It may be an implicit term of the promise, or it may be supplied by law.").

Courts across the country likewise recognize that the implied covenant of good faith and fair dealing may supply a sufficient limitation on contractual discretion to prevent a promise from being illusory. *See Canteen*, 900 S.E.2d at 897 (holding the implied covenant of good faith and fair dealing is a "sufficient limitation on a promisor's freedom of choice and as such remedies any purported issues of illusoriness"); *see also Vivos Xpoint Inv. Grp., LLC v. Sindorf*, 35 N.W.3d 80, 86 (S.D. 2026) ("[A]n obligation under a contract is not illusory if the obligated party's discretion must be exercised with reasonableness or good faith." (citing 17A AM. JUR. 2D *Contracts* § 125)); *Schell Bros., LLC v. Pickard*, No. 2022-0642-BWD, 2023 Del. Ch. LEXIS 70, at *17 (Del. Ch.

Mar. 21, 2023) ("[T]o the extent Petitioners' obligations under the Employee Addendum might otherwise be illusory, it is reasonably conceivable that the implied covenant of good faith and fair dealing limits Petitioners' discretion and binds them to the contract."); *Rode Oil Co. v. Lamar Advert. Co.*, No. W2007-02017-COA-R3-CV, 2008 Tenn. App. LEXIS 532, at *34 (Tenn. Ct. App. Sept. 18, 2008) (rejecting the plaintiff's contention that a contract was illusory given the promisor's limitation to exercise its duty of good faith and fair dealing); *Bassett v. Elec. Arts, Inc.*, 93 F. Supp. 3d 95, 106 (E.D.N.Y. 2015) ("[T]he arbitration provision was not invalid as illusory simply because [the party] had the unilateral right to modify the agreement . . . as the discretionary power to modify or terminate an agreement carries with it the duty to exercise that power in good faith and fairly."); *24 Hour Fitness, Inc. v. Superior Ct.*, 78 Cal. Rptr. 2d 533, 541–42 (Cal. Ct. App. 1998) ("Because the party's discretionary power to modify the terms of the [contract] in writing indisputably carries with it the duty to exercise that right fairly and in good faith . . . . the modification provision does not render the contract illusory.").

Plaintiffs' argument fails under either of its premises. If, as Plaintiffs' argument necessarily assumes, a valid Membership Agreement exists, the implied covenant applies as a term of that Agreement and limits SRP's exercise of its contractual discretion. SRP's course of performance, including its course of performance in providing notice, is also relevant to that analysis. *See Commercial Credit Corp.*, 247 S.C. at 367, 147 S.E.2d at 484 ("A contract includes not only what is expressly stated but also what is necessarily to be implied from the language used and external facts, such as the surrounding circumstances.") (citing 17A C.J.S. *Contracts* § 328, p. 282–84); *see also Langston v. Niles*, 265 S.C. 445, 458, 219 S.E.2d 829, 834 (1975) (considering the parties' course of performance in resolving ambiguity in contract). If, on the other hand, Plaintiffs contend the Membership Agreement was void from inception because the modification provision rendered the entire contract illusory, *Prima Paint* requires the arbitrator—not this Court—to decide that contract-wide validity challenge.

South Carolina law favors construction of contracts that gives effect to the parties' agreement, not adopting a construction that unnecessarily renders the agreement invalid. *Gray v. State Farm Auto. Ins. Co.*, 327 S.C. 646, 649, 491 S.E.2d 272, 274 (Ct. App. 1997). Consistent with that principle, South Carolina law recognizes implied contractual obligations where necessary to carry out the purpose of the parties' agreement. *Commercial*, 247 S.C. at 367, 147 S.E.2d at 484 ("The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties being supposed to have made those stipulations which as honest, fair, and just men they ought to have made."); *Columbia*, 299 S.C. at 520-21, 386 S.E.2d at 262 ("The law will imply an agreement to do those things that according to reason and justice should be done to carry out the purpose for which the contract was made."); *M&G Polymers*, 574 U.S. at 440 ("[T]he illusory promises doctrine . . . instructs courts to avoid constructions of contracts that would render promises illusory"); 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 the parties intended a contract."). "Common sense and good faith are the leading touchstones of the construction of a contract, and contracts are to be so construed as to avoid an absurd result." *Floyd v. Dross*, 442 S.C. 79, 88, 897 S.E.2d 191, 196 (Ct. App. 2024). For these reasons, South Carolina's implied covenant of good faith and fair dealing supplies a meaningful limitation on SRP's exercise of its modification authority and further forecloses Plaintiffs' contention that the Membership Agreement is illusory.

iii. Federal law further limits and informs when SRP may modify account terms with or without notice.

Federal regulations likewise contemplate modifications to financial-account terms upon notice, independent of any contractual change-in-terms provision. *See* 12 C.F.R. § 1005.8(1) (governing notice requirements for electronic fund transfers term changes). Federal law also permits certain changes without advance notice. For example, regulations implementing the Truth in Savings Act expressly permit certain changes, including changes in the dividend rate, without advance notice. *See* 12 C.F.R. § 707.5(a)(2) ("No notice required. No notice under this section is required for: (i) Variable-rate changes. Changes in the dividend rate . . .").[24] This is particularly important here because it provides context to the "without notice" language on which Plaintiffs rely in arguing that the Agreement is illusory. The change-in-terms provision states in part: "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." ECF No. 53-1 at § 34 (emphasis added). That regulatory framework is therefore particularly relevant because the modification provision itself expressly refers to "the method for determining dividends"—a subject on which federal law permits changes without advance notice.

While Plaintiffs insist the change-in-terms provision allows SRP to make *any* amendment "without notice," Plaintiffs read the provision too broadly. The provision must instead be read as a whole and in the regulatory context in which it operates. The phrase "except as expressly required by applicable law" incorporates applicable legal limitations, including the common-law

[24] Federal regulations identify other circumstances in which advance notice is unnecessary, including certain changes involving check-printing and term-share-account fees and changes necessary to maintain or restore the security of an electronic fund transfer. 12 C.F.R. §§ 707.5(a)(2(ii)-(iii), 1005.8(a)(2).

principles discussed above. Where the applicable law does not specify a notice period, the Membership Agreement provides that ten days or more will be sufficient.

Read as a whole, the change-in-terms provision contemplates advance notice except where applicable law permits a change without notice. And there is no dispute that SRP provided actual advance notice of the amendment at issue here. Plaintiffs nevertheless isolate the words "without notice" and read them as granting SRP unlimited modification authority—a reading that the provision as a whole. Courts in South Carolina "assume the parties intended a meaningful agreement . . . and will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so." *Herrington*, 435 S.C. at 248, 866 S.E.2d at 581–82.

Even if the Court finds the provision ambiguous, the Court may properly consider the common law, including the implied covenant of good faith and fair dealing, federal law, and the parties' course of conduct to resolve such ambiguity. *See Langston*, 265 S.C. at 458, 219 S.E.2d at 834 (holding "conduct of the parties is entitled to great weight" in resolving any ambiguity). "[A] promise that is 'partly' illusory is by definition not illusory." *M&G Polymers*, 574 U.S. at 441.

In sum, SRP's modification authority is not unlimited. The Membership Agreement itself addresses notice; South Carolina common law—including the implied covenant of good faith and fair dealing—limits the exercise of contractual discretion; and federal law regulates when financial-account terms may be changed with or without notice. SRP also provided Plaintiffs actual advance notice of the amendment challenged here. These contractual and legal limitations foreclose Plaintiffs' contention that SRP's performance was entirely optional or that the Membership Agreement was illusory from its inception.

CONCLUSION

Plaintiffs expressly agreed to be bound by the Membership Agreement "as amended from time to time." SRP then provided advance notice of the amended Arbitration Provision, advised Plaintiffs that continued use without opting out would constitute acceptance, and afforded them a meaningful opportunity to opt out without affecting their other membership rights. Plaintiffs did not opt out and continued using SRP's services. On these facts, Plaintiffs manifested assent to the amended Arbitration Provision. The Court should answer the first certified question **"Yes."**

The Court should decline to answer the second certified question. Plaintiffs' contention that the Membership Agreement is illusory attacks the validity of the contract as a whole, not the Arbitration Provision specifically. Under *Prima Paint* and the severability doctrine, that challenge is for the arbitrator to decide. If the Court nevertheless reaches the second question, it should answer that question **"Yes."** SRP's authority to modify the Membership Agreement is constrained by the Agreement's own terms, South Carolina common law—including the implied covenant of good faith and fair dealing—and applicable federal law. Those express and implied limitations foreclose Plaintiffs' contention that SRP's obligations were entirely optional or that the Membership Agreement was illusory from its inception.

Accordingly, SRP respectfully requests that the Court answer the first certified question **"Yes,"** decline to answer the second certified question under *Prima Paint*, and, if the Court reaches the second question, answer it **"Yes."**

Signature Page to Follow

Respectfully submitted,

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