IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

IOWA BUSINESS SPECIALTY COURT

Kerry Minner, Individually and on Behalf of all Others Similarly Situated,	)))	**Case No. LACV082393**
Plaintiff,	))	
v.	))	**RULING ON DEFENDANT'S MOTION TO DISMISS OR STAY AND COMPEL ARBITRATION**
Greenstate Credit Union,	))	
Defendant.	)	

Defendant's Motion to Dismiss or Stay and Compel Arbitration is before the Court for consideration. The Court, having considered said motion, Plaintiff's Resistance and Defendant's Reply, issues the following ruling.

BACKGROUND FACTS

Plaintiff Kerry Minner (Hereinafter "Plaintiff") is a customer of Defendant GreenState Credit Union (Hereinafter "Defendant"), and at all relevant times had an account with them. On January 1, 2021, Defendant delivered electronic notice to Plaintiff's email address regarding his electronically available December 2020 statement, which was Plaintiff's requested mode of receiving statements. Included within that statement was an amended contract for the banking services which Defendant provides to its customers. The amended contract added an arbitration provision which stated that all disputes arising out of or relating to customer accounts must be resolved by final and binding arbitration, with the arbitrator's fee paid by Defendant. The arbitration provision was typed in all capital letters, in contrast to the other clauses of the contract. The statement also contained on the last page an "OPT OUT NOTICE," which

permitted customers of the credit union to opt out of the amended arbitration clause by providing written notice to Defendant within 30 calendar days. Sworn testimony and electronic records provided by Defendant assert that Plaintiff's digital account identifier was used to access the monthly statement and view it on two separate occasions. Sworn testimony provided by Defendant further asserts that Plaintiff made no claims of unauthorized access to his accounts within the last 4 years.

On March 17, 2021, Plaintiff filed a Class Action Petition against Defendant. That petition stated as a cause of action a claim for breach of contract, alleging that Defendant breached the terms of their agreement with Plaintiff and other similarly situated persons by assessing multiple overdraft fees for the attempted processing of a request for payment which would overdraw Plaintiff's account. Plaintiff alleges that this practice occurred 40 times with respect to Plaintiff's account, specifically. On April 19, 2021, Defendant filed the Motion to Dismiss or Stay and Compel Arbitration pursuant to Iowa Code §679A.2 and 9 U.S.C. §2, which is now before the Court. Defendant argues that the arbitration clause added to Plaintiff's contract is binding and compels arbitration. Plaintiff argues that he did not receive reasonable notice of the amended contract and that he never assented to it, and therefore is not bound by it.

ANALYSIS

In considering a motion to dismiss in the context of a civil action, the Court must view the well-pled facts in the petition in the light most favorable to the plaintiff, and resolve any doubts in favor of the plaintiff. *Turner v. Iowa State Bank & Trust Co. of Fairfield*, 743 N.W.2d 1, 3 (Iowa 2007). Ordinarily, a court "cannot consider factual allegations contained in the motion or the documents attached to the motion." *Id.* However, a court may consider matters outside of the pleadings in certain types of motions to dismiss. *Carroll v. Martir,* 610 N.W.2d 850, 856

(Iowa 2000). Defendant's motion to dismiss is such a motion, and the Court may properly consider the written contract that is the basis for Defendant's claim for enforcement of arbitration. *See Karon v. Elliott Aviation*, 937 N.W.2d 334, 347-348 (Iowa 2020) (Holding that a contract attached to a motion to dismiss for improper venue is properly considered when it forms the basis for the claim). The Court must also consider documents incorporated into Plaintiff's complaint by reference. *See King v. State*, 88 N.W.2d 1, 6 n.1 (Iowa 2012).

The Court further finds it necessary and appropriate to consider evidence presented by Defendant as well, to properly assess Defendant's claim of an enforceable arbitration clause. *See Brondyke v. Bridgepoint Educ., Inc.* 985 F.Supp.2d 1079, 1089-1090 (U.S. Dist. Ct. S.D. Iowa 2013) (Holding that a Court "is free to consider materials beyond the pleadings without converting the motion to one for summary judgment" in considering whether a claim must be arbitrated). The scope of the Court's analysis having been appropriately determined, the Court now turns to the question of whether the arbitration clause of the Parties' contract is enforceable.

"Iowa law favors arbitration." *Bartlett Grain Co., L.P. v. Sheeder*, 829 N.W.2d 18, 23 (Iowa 2013). However, "the court must make two threshold determinations before enforcing an arbitration award: whether there is a valid agreement to arbitrate and…whether the controversy alleged is embraced by that agreement." *Id.* "There is a presumption of arbitrability when the agreement contains an arbitration clause unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *State v. State Police Officers* Council, 525 N.W.2d 834, 836 (Iowa 1994) (Internal citations and quotations omitted). "Doubts should be resolved in favor of coverage." *Id.*

Furthermore, "Where the arbitrability of a dispute between the parties occurs in state court, as is the case here, the [Federal Arbitration Act] governs." *Ommen v. Milliman, Inc.*, 941

N.W.2d 310, 314 (Iowa 2020). The Federal Arbitration Act (Hereinafter "FAA") "is a congressional declaration of a liberal federal policy favoring arbitration agreements," *id.* (Quotations omitted), and "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

Plaintiff does not contend that the controversy in this case is beyond the reach of the arbitration clause in the amended contract. Moreover, the plain language of the arbitration clause clearly covers the current dispute, stating that the arbitration clause covers "all disputes arising out of or relating to this account agreement or the relationship between [the Parties] whether sounding in tort, contract, or otherwise." The Court finds that the arbitration clause covers the current controversy. The only issue left for this court to determine, then, is whether there was a valid agreement between Plaintiff and Defendant as to the arbitration clause.

"An at-will contract is terminable or modifiable by either party upon reasonable notice." *Johnson v. Associated Milk Producers, Inc.*, 886 N.W.2d 384, 389 (Iowa 2016). The contract before the arbitration amendment contains an Amendments and Termination clause which reserves to Defendant the right to change any term of the contract upon reasonable notice in writing to Plaintiff. The contract is also terminable at will by either party. Thus, reasonable notice was required both by the terms of the contract and by Iowa law to effectuate the addition of the arbitration clause, and the issue is whether Defendant provided reasonable notice of the change.

Defendant cites *Davis Mobile Homes, L.L.C v. U.S. Bank Nat. Ass'n* as authority for the reasonableness of their method for notifying Plaintiff of the change. 824 N.W.2d 562 (Table), 2012 WL 5356132 (Iowa Ct. App. 2012). While the *Davis Mobile Homes* opinion is

unpublished, the Court finds it persuasive regarding the issues now before the Court. The Iowa Court of Appeals in *Davis Mobile Homes, L.L.C.* held that where a bank provided a notice at the bottom of a customer's monthly statement to the effect that the terms and conditions of the bank have changed, and also provided a means to view the changed terms and conditions, the customer was charged with notice of the new terms and conditions. *Id.* at 4. The court in making their determination relied on the authoritative Iowa Supreme Court case *Dow City Cemetery Ass'n v. Defiance State Bank*, which established that Iowa law charges a customer with knowledge of the information contained in the bank statements they receive. 596 N.W.2d 77, 82 (Iowa 1999). The Court of Appeals reasoned that this duty also imputed knowledge of the additional notice included at the bottom of that Plaintiff's bank statement relating to updated terms and conditions. *Davis Mobile Homes*, *L.L.C.*, 2012 WL 5356132 at 4.

The notice in the current case consisted of a copy of the amended account agreement and an opt out notice, both contained in the December 2020 monthly statement along with a newsletter from Defendant. The new arbitration clause in the amended contract was written in all capital letters, making it stand out against the other provisions of the amended contract, which were not similarly emphasized. In addition, the opt out notice on the final page of the monthly statement contained a heading with all capital letters and a large font stating "OPT OUT NOTICE," and then proceeded to explain customers' rights to opt out of the arbitration clause. Although not required by Iowa law or the terms of their contract, Defendant provided Plaintiff with a 30-day window in which to opt out of the new arbitration clause by submitting a written request to that effect, further likening Defendant's actions to those of the bank in *Davis Mobile Homes, L.L.C.*, which also provided an opt out option. *Id.* at 1.

Notably, in Plaintiff's case, while he implies that GreenState has not offered sufficient proof to show he consented to receive electronic notice, he does not actually deny having consented to such. In fact, undisputed affidavits presented by Defendant show that Plaintiff has been requesting and receiving electronic notices and statements of his account since at least 2010. Def.'s Reply in Supp. of Mot. to Dismiss or Stay and Compel Arbitration, Supp. Ex. 1 at ¶ 5. Further affidavits offered by Defendant show that Plaintiff has been accessing his online account to review his statements for years, in addition to utilizing said access to monitor other activity on his account. Def.'s Reply in Supp. of Mot. to Dismiss or Stay and Compel Arbitration, Supp. Ex. 2 at ¶ 8.

Indeed, it seems that offering such notification through electronic means was the only way Defendant could have notified Plaintiff. Plaintiff provided only his email address when Defendant requested contact information from him. Def.'s Reply in Supp. of Mot. to Dismiss or Stay and Compel Arbitration, Supp. Ex. 4 at ¶ 7. Plaintiff's online account, which he can freely edit, is set to send all notifications electronically to his email address and deliver all documents online only. Supp. Ex. 4 at ¶ 8. Plaintiff does not deny that Defendant sent notice of the December 2020 statement to the email address he listed as the sole means of contacting him. Nor does he contend he was unable to access the statement on his account or that Defendant prevented him from reviewing the arbitration amendment and opt-out notice. Iowa law, like other U.S. jurisdictions, holds contractees accountable for their failure to read readily accessible terms of the contracts they sign. *Bryant v. Am. Exp. Financial Advisors, Inc.,* 595 N.W.2d 482, 486 (Iowa 1999) (holding arbitration requirement was valid and binding where no one prevented plaintiff from reading arbitration provision incorporated into the agreement, and the plaintiff simply chose not to read it); *In Re U.S. Home Corp.,* 236 S.W.3d 761, 764 (Tex. 2007) (Finding

"no one prevented" plaintiff from reading arbitration clause and "[l]ike any other contract clause, a party cannot avoid an arbitration clause simply by failing to read it"). Moreover, it seems here that Plaintiff did read the provisions he seeks to annul, having signed into his account and viewed the exact document at issue at least twice, once on January 6, 2021, and again on February 12. Def.'s Reply in Supp. of Mot. to Dismiss or Stay and Compel Arbitration, Supp. Ex. 7 at ¶ 9-10; Def.'s Reply in Supp. of Mot. to Dismiss or Stay and Compel Arbitration, Supp. Ex. 8; Def.'s Mot. to Compel Arbitration, Ex. B-1. Fraudulent activity is not at issue in this case, as Plaintiff does not allege that anyone else improperly accessed his account.

Bearing in mind the foregoing, it is clear that Plaintiff did in fact read the Monthly Statement at issue. Plaintiff does not deny this, nor does he deny having received effective electronic notices in the past regarding his monthly statements. In sum, Respondent provided Plaintiff with notice of and access to his monthly statement for December 31, 2020, exactly in the manner dictated by Plaintiff and which had been in effect between the two, without issue, for years, and Plaintiff proceeded to read the statement on two separate occasions. In arguing that he did not read the arbitration amendment presented to him, and therefore should not be bound by it, Plaintiff fails to account for the well-settled principle of Iowa contract law that "an agreement to arbitrate is treated like any other contract, and a failure to fully read and consider the contract cannot relieve [Plaintiff] of its provisions." *Bryant,* 595 N.W.2d at 486. *See also Bartlett Grain Co.*, 829 N.W.2d at 28 (holding failure to read an arbitration clause that was not part of the original agreement did not relieve a party of its effect); *Baldwin v. Menard, Inc.*, No. 3:18-cv-21-JAJ, 2018 WL 9815503, at *5 (S.D. Iowa 2018) (applying Iowa law) ("Courts have long held that a party's failure to read a contract containing an arbitration clause does not render it unenforceable.") Plaintiff asserts that the arbitration notice was so deeply hidden within the fine

print of the monthly statement that no reasonable person would know about it. Clearly this is not the case, as multiple members of Defendant have successfully opted out of the arbitration clause. Def's Mot. To Compel Arbitration, Ex. B at ¶ 11. Defendant has provided every indication that Plaintiff received the December monthly statement in accordance with his preferences and read it. The Court deems Defendant's method of notice to be reasonable.

The next issue is whether Plaintiff assented to the modification. "In an at-will contract, a party who gives notice of a changed term effectively offers a new contract in place of the existing one, which the other may accept by continued performance." *Johnson* 886 N.W.2d at 392. Plaintiff contends that he did not have actual knowledge of the changed term and that he therefore could not have assented to it. The Court finds the U.S. District Court case *Trogden v. Pinkerton's Inc.*, cited by Defendant, persuasive on this issue. 2003 WL 21516580 (S. D. Iowa 2003). The court in *Trogden,* while applying Iowa contract law, noted that "An offeree is charged with constructive knowledge of an offer if the offeree has the opportunity to read it, actual knowledge is not essential to the formation of a contract." *Id.* at 4. (citing *Morgan v. American Family Mut. Ins. Co.,* 534 N.W.2d 92, 99 (Iowa 1995) (overruled on other grounds in *Hamm v. Allied Mut. Ins. Co.,* 612 N.W.2d 775, 784 (Iowa 2000)). The court in *Trogden* concluded that because the plaintiff had an opportunity to read the handbooks governing the terms of her employment, she was therefore charged with knowledge of the arbitration provision contained therein. Much like in *Trogden*, Plaintiff had the opportunity to read the monthly statement containing the amendment.

Moreover, as explained above, there is every indication that Plaintiff did read the monthly statement at issue. To the extent that Plaintiff claims he did not have actual knowledge of the amended contract, such a claim in light of the foregoing could only plausibly stem from an

assertion that despite having accessed the monthly statement, Plaintiff chose not to read it in its entirety. Plaintiff's willing failure to read the monthly statement in its entirety does not render Defendant's methodology of notifying him unreasonable, and it likewise does not excuse Plaintiff from the amended contract if Plaintiff in fact ratified the amendment by his conduct. *Bryant* 595 N.W.2d at 486.

The Court must next determine whether there was acceptance of the modification by Plaintiff. "Consent to the modification [of a contract] may be either express or implied from acts or conduct." *Seneca Waste Solutions, Inc. v. Sheaffer Mfg. Co. LLC*, 791 N.W.2d 407, 413 (Iowa 2010) (Internal citations omitted). Here, Plaintiff accepted the new contract by continuing to bank with Defendant after the new contract was proposed and the period for opting out had expired.

Plaintiff asserts that continued performance should not manifest assent in the context of a consumer bank account. *Davis Mobile Homes, L.L.C.* is directly on point regarding this issue as well. In *Davis Mobile Homes, L.L.C.*, the bank's contract gave the plaintiff 30 days to opt out of the amendment (in that case by terminating their account), which the plaintiff failed to do. 2012 WL 5356132 at 2. The court there found that "the customer's continued use of the account after being offered access to the terms of the agreement constituted acceptance, adoption, ratification, or the like of [the bank's] terms." *Id.* at 5 (Internal quotations omitted). In the current case, the Court finds that Plaintiff's continued use of their account following notice of the arbitration amendment, much like the continued use in *Davis Mobile Homes, L.L.C.*, constituted an acceptance of the modification.

Plaintiff cites multiple sources from other jurisdictions in their Resistance to Defendant's Motion to Dismiss the Case or Stay and Compel Arbitration. Unlike Defendant's brief, Plaintiff

cites no cases of Iowa law in support of their contentions that the monthly statement was not reasonable notice and that there was no ratification. As there are both authoritative and persuasive cases of Iowa law on point regarding the issues in this case, the Court declines to follow contrary authority from other jurisdictions. Having found that the arbitration clause covers the current dispute, that Plaintiff had at least constructive knowledge of the arbitration amendment, and that by continuing to bank with Defendant, Plaintiff assented to the amendment, the Court concludes the arbitration clause must be enforced.

Defendant correctly notes that there is some inconsistency in Iowa law as to whether a case involving an arbitration clause should be dismissed or stayed while arbitration is compelled. *Compare Bullis v. Bear, Stearns & Co., Inc.*, 553 N.W.2d 599, 602 ("[Defendant] is thus entitled to a stay of proceedings and an order compelling arbitration."); *with Fell P'ship v. Heartland Co-op,* No. 16-1180, 2017 WL 2875870, at *3 (Iowa Ct. App. 2017) (holding that "a stay of court proceedings pending arbitration is not an available remedy in Iowa"); *see also Ommen* 941 N.W.2d at 313, 321 (Iowa 2020) (holding that the district court erred in not granting the motion to dismiss and compel arbitration). Given that the Court does not know whether Plaintiff will elect to pursue arbitration, the Court has determined that dismissal is appropriate.

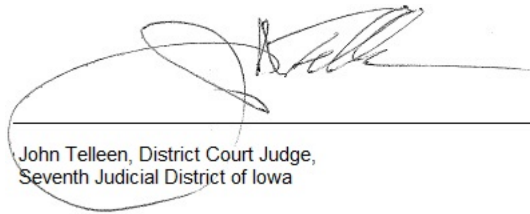
RULING

For all of the above-stated reasons, it is the ruling of the Court that the Defendant's Motion to Dismiss is GRANTED. It is ordered that Plaintiff's Petition is dismissed at Plaintiff's cost.

State of Iowa Courts

Case Number	**Case Title**
LACV082393	MINNER V. GREENSTATE CREDIT UNION
Type:	DISMISSED PER COURT

So Ordered



John Telleen, District Court Judge,
Seventh Judicial District of Iowa

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