APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SEVIER COUNTY SCHOOLS FEDERAL CREDIT UNION; SUSANNE MUNSON; GEOFFREY WOLPERT; CHARLES MCGAHA; CHARLENE MCGAHA; ROBIN NICHOLS; GREGORY NICHOLS; REX NICHOLS; SARAH MORRISON, *Plaintiffs-Appellants*, *v.* BRANCH BANKING AND TRUST COMPANY, *Defendant-Appellee.*	No. 20-5174

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
No. 3:19-cv-00138—Travis Randall McDonough,
District Judge.

Argued: December 2, 2020

Decided and Filed: March 5, 2021

Before: MOORE, GILMAN, and GRIFFIN,
Circuit Judges.

COUNSEL

ARGUED: Gregory Brown, LOWE YEAGER & BROWN PLLC, Knoxville, Tennessee, for Appellants. John S. Hicks, BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWTIZ, P.C., Nashville, Tennessee, for Appellee.

ON BRIEF: Gregory Brown, Christopher Field, W. Scott Hickerson, LOWE YEAGER & BROWN PLLC, Knoxville, Tennessee, Donald K. Vowell, THE VOWELL LAW FIRM, Knoxville, Tennessee, for Appellants. John S. Hicks, Christopher E. Thorsen, BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWTIZ, P.C., Nashville, Tennessee, Nicholas W. Diegel, BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWTIZ, P.C., Knoxville, Tennessee, for Appellee.

GILMAN, J., delivered the opinion of the court in which MOORE, J., joined. GRIFFIN, J., delivered a separate dissenting opinion.

OPINION

RONALD LEE GILMAN, Circuit Judge. This is a putative class action brought by the Sevier County Schools Federal Credit Union and other account holders (the Plaintiffs) against the Branch Banking & Trust Company (BB&T). The Plaintiffs allege that BB&T failed to honor a commitment made by one of its predecessors, the First National Bank of Gatlinburg (FNB), promising that the annual interest rate on certain high-interest Money Market Investment Accounts was guaranteed to "never fall below 6.50%."

The Plaintiffs might well prevail on the merits of their dispute with BB&T because, on the surface at least, the bank is trying to wriggle out of a commitment made years ago to these Plaintiffs by FNB. But the issue presently before us is not the merits of this dispute; instead, we must decide whether the merits should be resolved by a court or by an arbitrator. This is because BB&T's Bank Services Agreement (BSA) specifies that all disputes between the parties "shall be determined by arbitration."

BB&T moved to dismiss the complaint and to compel arbitration, which the district court granted. For the reasons set forth below, we **REVERSE** the judgment of the district court and **REMAND** the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual background

1. The 6.5% interest-rate guarantee

In 1989, the Plaintiffs opened Money Market Investment Accounts (MMIAs) with FNB. FNB guaranteed that the MMIAs' annual rate of interest would "never fall below 6.5%." The original contract was two pages in length, did not include any provision limiting an account holder's right to enforce the agreement in court, and included the following change-of-terms provision:

> Changes in the terms of this agreement may be made by the financial institution from time to time and shall become effective upon the earlier of (a) the expiration of a thirty-day period of posting of such changes in the financial institution, or (b) the making or delivery of notice thereof to the depositor by the notice in the depositor's monthly statement for one month.

2. Mergers and amendments

In March 1997, FNB merged with BankFirst of Tennessee (BankFirst). BankFirst continued paying 6.5% annual interest on the MMIAs for the next four years. In July 2001, BankFirst merged with BB&T. BB&T was aware of the MMIAs and its obligations to former MMIA-holders because, three days after the merger, BB&T converted those accounts to "Money Rate Savings Accounts" (MRSAs). The conversion apparently involved nothing more than a change of name.

Upon acquiring BankFirst in 2001, BB&T claims that it sent a BSA to each account holder. The 2001

BSA stated that, by continuing to maintain an account with BB&T, the account holders agreed to the 2001 BSA's terms. Among those terms were provisions that (1) the 2001 BSA could be amended (as it later was in 2004 and again in 2017), (2) amendments would be promulgated by written notice to the account holders, and (3) continued use of an account after receipt of notice constituted acceptance of the amendment. The 2001 BSA also included the following arbitration provision: "You and [BB&T] each have the option of requiring that any dispute or controversy concerning your account be decided by binding arbitration." This provision would have made the account holders responsible for half the initial costs of arbitration, while also allowing an arbitrator to award "the costs of arbitration or attorneys' fees as part of the decision."

BB&T amended the BSA in 2004. The 2004 BSA, among other terms, added a class-action waiver and abolished all "special, incidental, consequential, punitive or indirect damages, including without limitation loss of profits."

In April 2017, BB&T once again amended the BSA. This amendment (the 2017 Amendment) made massive changes to the BSA, including an amendment to the arbitration provision. The provision began as follows:

> IT IS IMPORTANT THAT YOU READ THIS ARBITRATION PROVISION CAREFULLY. IT PROVIDES THAT YOU MAY BE REQUIRED TO SETTLE A CLAIM OR DISPUTE THROUGH ARBITRATION EVEN IF YOU PREFER TO LITIGATE SUCH CLAIMS IN COURT. YOU ARE WAIVING RIGHTS YOU MAY HAVE TO

> LITIGATE THE CLAIMS IN A COURT OR BEFORE A JURY. YOU ARE WAIVING YOUR RIGHT TO PARTICIPATE IN A CLASS ACTION LAWSUIT, CLASS ACTION ARBITRATION, OR OTHER REPRESENTATIVE ACTION WITH RESPECT TO SUCH CLAIMS.

It continued:

> Any dispute, claim, controversy or cause of action, that is filed in any court and that arises out of or relates to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope of applicability of this agreement to arbitrate, shall be determined by arbitration before one arbitrator at a location mutually agreed upon in the state where your account is maintained, or as may be otherwise required under the JAMS Minimum Consumer Standards, which is incorporated by reference herein . . . . If a party elects arbitration, it may be conducted as an individual action only. This means that even if a demand for a class action lawsuit, class arbitration, or other representative action (including a private attorney general action) is filed, the matter will be subject to individual arbitration. Either party may bring a summary or expedited motion to compel arbitration or to stay the applicable litigation of a dispute in any court. Such motion may be brought at any time, and the failure to initiate or request arbitration at the beginning of litigation shall not be

> construed as a waiver of the right to arbitration.

The reference to "JAMS" in the above paragraph is directed to the organization formerly known as Judicial Arbitration Mediation Services, Inc. See Cal. Comm. Int. Dev. L. & Prac. § 21:120 (2020 ed.). It is a network of former judges, legal academics, and professional mediators with a background in Alternative Dispute Resolution (ADR). *Id*.

BB&T allegedly sent notice of the 2017 Amendment to each customer. In the notice was the following reference to the amendment of the arbitration provision: "The following paragraph replaces both the second and third paragraphs of the ARBITRATION AGREEMENT section of your [BSA]." Also in the notice was a statement that the account holders and BB&T were participating in transactions involving interstate commerce and were therefore "governed by the provisions of the Federal Arbitration Act . . . and not by any state law concerning arbitration." As with the prior changes, the 2017 Amendment provided that continued use of the account after receiving notice constituted acceptance of the changes. All of the Plaintiffs maintained their MRSAs following the 2017 Amendment.

3. BB&T decides to lower the interest rate

From its initial acquisition of BankFirst in July 2001 until January 2018, BB&T—like BankFirst—respected the 6.5% interest rate for the former MMIAs. In January 2018, however, the Plaintiffs were notified that the annual percentage rate applicable to their accounts would soon drop by more than five percentage points—from 6.5% to 1.05%—in

March 2018. The Plaintiffs were also informed that, starting in April 2019, the rates would "automatically adjust to BB&T's standard balance tiers, as well as to the current standard variable rate of the interest and APY [annual percentage yield]." For accounts with balances of $1,000 and up, these "standard balance tiers" reflected the industry's then-current interest rate—only 0.01% per year.

B. Procedural background

In March 2019, the Plaintiffs filed an action in the Circuit Court for Sevier County, Tennessee on behalf of themselves and all other similarly situated persons. They argued that BB&T is liable for breach of contract due to its actions in lowering the guaranteed interest rate. BB&T removed the lawsuit to federal court in a timely manner. Soon thereafter, the bank filed a motion to dismiss and to compel arbitration, which the district court granted. The district court had diversity-of-citizenship jurisdiction under 28 U.S.C. § 1332. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

II. ANALYSIS

A. Standard of review and applicable law

We review de novo both the existence and validity of an agreement to arbitrate. *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 376 (6th Cir. 2005). Such review is conducted pursuant to "ordinary state-law principles that govern the formation of contracts." *Glazer v. Lehman Bros., Inc.*, 394 F.3d 444, 450 (6th Cir. 2005) (holding that the question of whether an arbitration provision is valid is one of state contract law). Here, the relevant law is that of Tennessee. *Williams v. Smith*, 465 S.W. 3d 150, 153 (Tenn. Ct. App. 2014) (noting that Tennessee follows the rule of

lex loci contractus, which creates a presumption that a contract is governed by the law of the jurisdiction where it was executed); *see also Smith v. Servicemaster*, 2009 WL 1457143, at *3 (M.D. Tenn. May 22, 2009) ("Because arbitration agreements are fundamentally contracts, the enforceability of a purported agreement to arbitrate is evaluated according to the applicable state law of contract formation.").

An arbitration agreement may be "voided for the same reasons for which any contract may be invalidated under [Tennessee] law." *Hudson v. BAH Shoney's Corp.*, 263 F. Supp. 3d 661, 667 (M.D. Tenn. 2017). Before allowing a case to be arbitrated, a court must therefore examine whether the contract is valid under the law of the state where it was executed. *Cooper v. MRM Investment Co.,* 367 F.3d 493, 499 (6th Cir. 2004).

The Federal Arbitration Act (FAA) makes this concept explicit in its so-called "savings clause," which provides that a written provision in a contract "to settle by arbitration a controversy thereafter arising out of such contract . . . shall be 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 (emphasis added). So despite "a national policy favoring arbitration," *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), an arbitration agreement will not be enforced if the parties never agreed to arbitrate in the first place. *Capps v. Adams Wholesale Co., Inc*., 2015 WL 2445970, at *3 (Tenn. Ct. App. 2015) (affirming the trial court's denial of a motion to compel arbitration because mutual assent was found lacking).

B. Because there was no mutual assent, the 2001 BSA and its subsequent amendments are invalid to the extent that they materially changed the terms of the original agreement

In Tennessee and generally, two essential elements in the formation of a valid contract are (1) consideration and (2) mutual assent. *Staubach Retail Servs.-Southeast, LLC v. H.G. Hill Realty Co.,* 160 S.W.3d 521, 524 (Tenn. 2005) (A contract "must result from a meeting of the minds of the parties in mutual assent to the terms, must be based upon a sufficient consideration, [must be] free from fraud or undue influence, [must] not [be] against public policy and [must be] sufficiently definite to be enforced.") (citation omitted). The Plaintiffs argue that both consideration and mutual assent are lacking with regard to the arbitration provision. They are wrong about consideration, but are correct as to the lack of mutual assent.

1. Consideration

The Plaintiffs' argument that the BSAs are not binding because of a lack of consideration regarding their agreement to arbitrate is unavailing. "Mutuality of promises is 'ample' consideration for a contract" in Tennessee. *Pyburn v. Bill Heard Chevrolet,* 63 S.W.3d 351, 358 (Tenn. Ct. App. 2001) (quoting *Rodgers v. Southern Newspapers, Inc*., 379 S.W.2d 797, 800, (Tenn. 1964)). Both state and federal courts have consistently found that consideration exists so long as the arbitration agreement binds both parties. *Id*. ("A mutual promise in itself would constitute a sufficient consideration.") (citation and internal quotation marks omitted); *Hudson*, 263 F. Supp. 3d at 671 (holding that a mutual promise alone

constituted consideration). Because the arbitration provision within the 2017 Amendment binds both the Plaintiffs and BB&T, there is adequate consideration for the provision.

2. Mutual assent

What is lacking in this case is the Plaintiffs' consent to the arbitration provision in the BSAs. This issue is controlled by Tennessee law.

a. The district court's analysis

A meeting of the minds sufficient to give rise to mutual assent "is determined by assessing the parties' manifestations according to an objective standard." *Wofford v. M.J. Edwards & Sons Funeral Home Inc*, 490 S.W.3d 800, 810 (Tenn. Ct. App. 2015) (citations and internal quotation marks omitted). Whether any given action "constitutes an acceptance must be assessed in terms of whether it would lead a reasonable person to conclude that the offer has been accepted." *Rode Oil Co. v. Lamar Advert. Co.*, 2008 WL 4367300, at *8 (Tenn. Ct. App. Sept. 18, 2008) (citation and internal quotation marks omitted). Tennessee courts are consistent in holding that, even though an action as explicit as a signature is not necessary for mutual assent, mutual assent should not "be inferred from . . . unilateral acts . . . or by an ambiguous course of dealing between the parties from which different inferences regarding the terms of the contract may be drawn." *Burton v. Warren Farmers Co-op*, 129 S.W.3d 513, 521 (Tenn. Ct. App. 2002).

The issue in this case is whether, after agreeing to be bound by the initial MMIA agreement, the Plaintiffs assented to the new terms set out in the BSAs from BB&T. As the district court noted, if the Plaintiffs did not explicitly assent to these new terms,

then "the question becomes whether Plaintiffs are otherwise bound to the [BSA] and its amendments by virtue of their continued use of the accounts." *Sevier Cnty. Schs. Fed. Credit Union v. Branch Banking & Trust Co.,* 432 F. Supp. 3d 735, 744 (E.D. Tenn. 2020).

In evaluating this question, the district court agreed with the Plaintiffs that silence or inaction does not automatically constitute acceptance of an offer; however, it continued, silence or inaction can constitute acceptance when the circumstances "indicate that such an inference of assent is warranted." *Id*. at 744 (quoting *Westfall v. Brentwood Servs. Grp., Inc.*, 2000 WL 17121659, at *5 (Tenn. Ct. App. Nov. 17, 2000)). The district court ultimately agreed with BB&T's argument that the Plaintiffs did not merely remain silent here, but took action sufficient to manifest assent by continuing to maintain their accounts with BB&T. *Id*. at 748.

Although the district court found "no Tennessee or related federal case directly address[ing] the circumstances at issue" here, *id*. at 745, it cited employment and subscription-service cases where courts have found that continuing with a particular course of action suggests the existence of mutual assent as a matter of law, even if not of reality. *Id.* at 745–48. The district court concluded that the balance of analogous cases suggested that mutual assent existed. *Id*. at 748 ("Although these Tennessee cases do not directly control the resolution of the case at issue, they counsel toward finding that Plaintiffs assented to be bound by the arbitration agreement.").

In agreeing with the district court's conclusion, the dissent cites *Seawright v. American General Financial Services, Inc.,* 507 F.3d 967 (6th Cir. 2007), for the proposition that this court has "recognized that

identical conduct in similar contexts constitutes acceptance under Tennessee law." (Dissent, p. 17) We respectfully disagree. *Seawright* involved an at-will employee who continued working after her employer instituted an arbitration provision, as opposed to BB&T's contractual obligations in question here. The context of the Plaintiffs' circumstances in the present case, in other words, is far from "identical" to that of the employee in *Seawright*.

Even the district court distinguished *Seawright* as one of the employment cases that does not directly address the issue pending before us. *See Sevier*, 432 F. Supp. at 745. But the district court did find three factors especially salient. First, the Plaintiffs never objected, over the course of almost two decades, to the arbitration provision. *Id.* at 748. Second, even though the Plaintiffs never signed any of the agreements or otherwise assented in writing, the BSAs explicitly stated that continuing to hold accounts with BB&T would function as an acceptance of their terms. *Id.* The final factor the court noted was that "individuals and organizations who maintain accounts at banks would reasonably expect their relationship with the bank to be governed by some sort of agreement." *Id.*

There are several problems with the district court's analysis. First, the record is unclear as to whether the correct procedure was followed. *See id*. at 744 (acknowledging that "[f]rom the Court's own review of the record, it remains unclear whether these documents were distributed in a manner consistent with the MMIA Agreement"). As for the second point—the BSAs' language that merely maintaining the accounts was deemed acceptance—this court addressed the issue in *Lee v. Red Lobster Inns of America, Inc.,* 92 F. App'x 158 (6th Cir. 2004),

reasoning that "[t]he flaw in the district court's analysis is that it places the burden on the [consumers] to . . . object to a company's unilaterally adopted arbitration policy or risk being found to have agreed to it. This is not how contracts are formed." *Id*. at 162. "The mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction or impose on him any duty to speak." *Id.* (quoting Restatement (Second) of Contracts § 69, cmt. a (1981)).

Third, whether "individuals and organizations who maintain accounts at banks would reasonably expect their relationship with the bank to be governed by some sort of agreement," *Sevier*, 432 F. Supp. 3d at 748, is not material. The proper question is whether, upon assenting to the original two-page MMIA agreement, such individuals and organizations would reasonably expect their relationship to be governed—more than a decade later—by new provisions unilaterally added by a successor bank to such an extent that the BSA ultimately contained terms that materially changed the Plaintiffs' rights and obligations under the original agreement. *See Johnson v. Welch*, 2004 WL 239756, at *8 (Tenn. Ct. App. 2004) (noting that "in construing contracts, courts must look at the language and the parties' intent and impose a construction that is fair and reasonable," and that "[r]easonableness must be viewed in light of the parties' situation *at the time of the making of the agreement* as well as at the time performance becomes due") (emphasis added).

This exposes the major flaw in the district court's analysis—its failure to address whether the BSAs are invalid by virtue of exceeding the scope of the original change-of-terms provision. BB&T relies on this

provision in the original two-page MMIA agreement between FNB and the Plaintiffs to impose new terms contained in an agreement that ultimately stretched to 33 pages. When a party makes a unilateral change of this magnitude, and especially where that party has vastly greater bargaining power, a court should carefully examine whether the proposed changes are (1) reasonable, and (2) not in violation of the implied covenant of good faith and fair dealing. *See Hathaway v. Hathaway*, 98 S.W.3d 675, 678-79 (Tenn. Ct. App. 2002) ("[A] qualifying word which must be read into every contract is the word 'reasonable' or its equivalent 'reasonably.'") (quoting *Minor v. Minor*, 863 S.W.2d 51, 54 (Tenn. Ct. App. 1993)); *Wallace v. Nat'l Bank of Commerce*, 938 S.W.2d 684, 686 (Tenn. 1996) ("[T]here is implied in every contract a duty of good faith and fair dealing in its performance and enforcement . . . .") (citation omitted).

The BSAs in question are clearly contracts of adhesion. *See Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996) (defining a contract of adhesion as "a standardized contract form offered to consumers of goods and services on essentially a 'take it or leave it basis'" that affords the consumer with no "realistic opportunity to bargain" and, critically, where the consumer "cannot obtain the desired product or service except by acquiescing to the form of the contract") (citations omitted). This conclusion is bolstered by the fact that other courts analyzing BB&T's BSAs have concluded that they were contracts of adhesion. *See, e.g.*, *In re Checking Account Overdraft Litig. MDL No. 2036*, 685 F.3d 1269, 1280 n.13 (11th Cir. 2012) (finding that BB&T's BSA was a contract of adhesion under South Carolina law).

The change-of-terms provision in the original MMIA agreement stated that "[c]hanges in the terms of this agreement may be made by the financial institution from time to time" so long as they were posted in the institution or mailed in a monthly statement. Armed with this simple provision, BB&T argues that even fundamental changes to the original contract are valid, regardless of their magnitude or character. The district court implicitly accepted this argument by concluding that the 2001 BSA and its later amendments in 2004 and 2017 were valid despite the expansion of the original 2-page document into a BSA 33 pages in length.

In its analysis, however, the district court failed to meaningfully consider the Plaintiffs' argument that BB&T's addition of the arbitration provision as part of this expansion was inconsistent with the substance of the original change-of-terms provision. Its total analysis on this point consisted of a two-sentence footnote that failed to cite to any authority. *See Sevier*, 432 F. Supp. 3d at 744 n. 4 ("Plaintiffs also contend that the addition of an arbitration agreement was not contemplated by the language of the MMIA Agreement. However, because the Court finds that BB&T did not follow the procedures for effectuating an amendment to the MMIA Agreement, it need not consider the substantive reasonableness of the change.") (citation omitted).

The Plaintiffs in their briefing do not contest "that [BB&T] could make *reasonable changes* to the banking agreement pursuant to [the MMIA's change-of-terms] provision." (Emphasis in original.) They instead properly assert that BB&T's discretion under the original change-of-terms provision to amend the terms is not unlimited, but is subject to two

requirements: (1) that any changes be reasonable, and (2) that BB&T exercise its discretion to make such changes in a manner consistent with the implied covenant of good faith and fair dealing.

b. The reasonableness requirement

Per the reasonableness requirement, the Plaintiffs argue that any changes must be limited to changing terms that were included in the original agreement. And because the original agreement with FNB made no mention of dispute resolution, much less of limiting the Plaintiffs' right to go to court, they contend that BB&T cannot force the Plaintiffs to arbitrate. The Plaintiffs principally rely on *Badie v. Bank of America*, 67 Cal. App. 4th 779 (Cal. Ct. App. 1998), a seminal case on this point with facts materially indistinguishable from those present here, in support of their argument.

In *Badie*, the California Court of Appeal found that a similar change-in-terms provision did not give the bank the right to unilaterally add an arbitration provision to the account holder's original agreement. The court noted that, as here, the proposed change was attempted via notice, and that "the method and forum for dispute resolution—a matter . . . collateral to that relationship—is not discussed at all" in the original agreement. *Id*. at 800. Moreover, the court concluded that "there [was] nothing about the original terms that would have alerted a customer to the possibility that the Bank might one day in the future invoke the change of terms provision to add a clause that would allow it to *impose* ADR on the customer." *Id*. at 801 (emphasis in original).

The *Badie* court explained that a bank does not have a unilateral right "carte blanche to make any

kind of change whatsoever so long as a specific procedure is followed." *Id*. at 791. The change must instead be "a modification whose general subject matter was anticipated when the contract was entered into." *Id*. As a result, the court said that it could not "assume . . . that notice alone, without some affirmative evidence of the depositor's consent, could bind a depositor to a significant change regarding matters that were not addressed in the original contract at all." *Id*. at 793. *Badie*'s logic is even more applicable here, where the record is unclear as to whether BB&T made the changes to the BSAs in a manner consistent with the original change-of-terms provision, or if the Plaintiffs even received the 2001 BSA or its 2004 and 2017 amendments. *See Sevier*, 432 F. Supp. 3d at 744.

BB&T's argument that we should disregard *Badie* is unpersuasive because the bank relies on a false premise—that *Badie* is "unorthodox and rarely followed by other states." To the contrary, other courts confronting circumstances analogous to those here—an attempt by the dominant party to unilaterally and materially diminish its customers' rights under a contract of adhesion through a change-of-terms provision—have declined to apply *Badie* only when the customers had a "meaningful opportunity" to opt out of the arbitration provision. *See, e.g.*, *Valle v. ATM Nat., LLC*, 2015 WL 413449, at *4 (S.D.N.Y. Jan. 30, 2015) (noting that the "primary concern of *Badie* and related cases in springing unexpected terms on the consumer" is alleviated where consumers have "ample opportunity" to opt out of arbitration); *Howard v. Ferrellgas Partners*, *L.P.*, 92 F. Supp. 3d 1115, 1138 (D. Kan. 2015) (applying Kansas law, and approvingly referencing *Valle*'s "meaningful

opportunity to opt out" requirement) (internal quotation marks omitted).

Still other courts, moreover, have applied *Badie* even where the plaintiffs *could opt out* of the new arbitration provision. *See, e.g., Follman v. World Fin. Network Nat'l Bank*, 721 F. Supp. 2d 158, 165 (E.D.N.Y. 2010) (interpreting Ohio law in declining to enforce an added arbitration provision despite the inclusion of an opt-out clause); *Stone v. Golden Wexler & Sarnese, P.C.*, 341 F. Supp. 2d 189, 198 (E.D.N.Y. 2004) (interpreting Virginia law to find an arbitration provision unenforceable, and noting that several "courts have followed the *Badie* reasoning even when [the original agreement] allowed additions and [the consumers] were given an opportunity to opt out from the proposed arbitration clause").

Based on the circumstances in the case before us, we are persuaded that the Tennessee Supreme Court would follow the logic of *Badie*. The first reason that it would do so is because BB&T provided the Plaintiffs with no opt-out opportunity. This left the Plaintiffs with no choice other than to acquiesce to the new arbitration provision or to close their high-yield savings accounts. And closing their accounts is a totally unreasonable option because doing so would obviate the very essence of the Plaintiffs' accounts—the promise of a perpetual 6.5% annual interest rate.

We can take judicial notice that nowhere near such a rate is currently available anywhere else. *See* Investopedia, "Best High-Yield Savings Accounts" (March 4, 2021), https://www.investopedia.com/best-high-yield-savings-accounts-4770633 (listing the best high-yield savings account rates available, all of which show banks advertising rates of less than 1.00%); Fed. R. Evid. 201(b)(1) & (2) ("The court may

judicially notice a fact that is not subject to reasonable dispute . . . .").

c. The implied covenant of good faith and fair dealing

This leads to the second reason why we are persuaded that the Tennessee Supreme Court would follow the logic of *Badie*; *i.e.*, that the purported imposition of the arbitration provision would violate the common law's implied covenant of good faith and fair dealing. BB&T did not act reasonably when it added the arbitration provision years after the Plaintiffs' accounts were established by FNB, thus violating the implied covenant of good faith and fair dealing in its attempt to use the original change-of-terms provision to force the Plaintiffs to arbitrate.

The following analysis in *Badie* is especially pertinent in applying the implied covenant to the facts here:

> Where, as in this case, a party has the unilateral right to change the terms of a contract, it does not act in an "objectively reasonable" manner when it attempts to "recapture" a foregone opportunity by adding an entirely new term which has no bearing on any subject . . . in the original contract and which was not within the reasonable contemplation of the parties when the contract was entered into. *That is particularly true where the new term deprives the other party of the right to a jury trial and the right to select a judicial forum for dispute resolution.*

Badie, 67 Cal. App. 4th at 796 (emphasis added) (internal citation omitted). We have every reason to

believe that the Tennessee Supreme Court would fully concur in this analysis.

One final point: the dissent's contrary conclusion is primarily based on its assertion that the Plaintiffs' inaction by continuing to maintain their accounts should be deemed an acceptance of BB&T's unilaterally imposed arbitration provision. This assertion, however, is not only inconsistent with Tennessee law, *see Johnson v. Welch*, 2004 WL 239756, at *8 (Tenn. Ct. App. 2004), but is completely neutralized by BB&T's own inaction for sixteen and a half years. For this long period of time (between July 2001 and January 2018), BB&T continued to honor the 6.5% interest-rate guarantee. The Plaintiffs were thus lulled into not giving a thought to the unilateral addition of the arbitration provision in the BSA. Why, after all, would they have any reason to believe that BB&T might someday attempt to end a guarantee that had been honored by BB&T ever since it first acquired the accounts in 2001? This is a classic case of the pot calling the kettle black, and is the antithesis of good faith and fair dealing.

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the district court's grant of BB&T's motion to dismiss and compel arbitration, and **REMAND** the case for further proceedings consistent with this opinion.

DISSENT

GRIFFIN, Circuit Judge, dissenting.

Because plaintiffs assented to this arbitration agreement, and because it is neither adhesive nor unconscionable, I respectfully dissent. I would affirm the district court's judgment.

I.

First, plaintiffs agreed to arbitrate these claims. In Tennessee, assent does not need to be explicit and may instead be "manifested, in whole or in part, by the parties' . . . actions or inactions." *Burton v. Warren Farmers Co-op*, 129 S.W.3d 513, 521 (Tenn. Ct. App. 2002). Action or inaction constitutes acceptance if it "would lead a reasonable person to conclude that the offer has been accepted." *Aqua-Chem, Inc. v. D & H Mach. Serv., Inc.*, No. E2015-01818-COA-R3-CV, 2016 WL 6078566, at *4 (Tenn. Ct. App. Oct. 17, 2016) (quotation omitted). Although assent may not "be inferred from the unilateral acts of one party or by an ambiguous course of dealing between the parties," *Burton*, 129 S.W.3d at 521, "[a]cting in a matter that indicates acceptance of a contract is generally deemed to be acceptance." *Aqua-Chem*, 2016 WL 6078566, at *4 (citation omitted).

Here, it is undisputed that when Branch Banking acquired BankFirst in 2001, it provided each plaintiff with a welcome letter that included a copy of the bank services agreement that would govern their accounts

from that point forward.[1] This agreement included an arbitration clause and stated that "when you . . . maintain a deposit account with the Bank, you are agreeing to the terms of this Bank Services Agreement," which could be "amended from time to time by the Bank," and that continued use of the account following notice of an amendment constituted acceptance of that amendment. In April 2017, Branch Banking amended the agreement to include the arbitration clause that applies to the parties' current dispute. The 2017 amendment reiterated that "[c]ontinued use of your account following a notice constitutes your acceptance of our changes." Plaintiffs never objected to any agreement or

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[1] Branch Banking offered an affidavit of one of its Vice Presidents to substantiate the steps it took to inform its new customers of the bank services agreement and subsequent amendments. Although plaintiffs challenge the admissibility of this affidavit, they offer no proof of their own to contradict its substance, nor do they allege that they did not receive the bank services agreement or any amendment. The district court considered, and rejected, the same admissibility arguments that plaintiffs raise on appeal. *Sevier Cty. Schs. Fed. Credit Union v. Branch Banking & Tr., Co.*, 432 F. Supp. 3d 735, 739 n.1 (E.D. Tenn. 2020). I see no abuse of discretion on the admissibility of this affidavit. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997). And because there is no dispute of fact, it was appropriate for the district court to decide the question of contract formation as a matter of law. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010) (issues that concern contract formation are "generally for courts to decide.") The district court also appropriately limited its analysis to whether a valid agreement had been formed, and left questions of arbitrability for the arbitrator, as provided for in the agreement. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019).

amendment and continued to maintain their accounts at Branch Banking.

In short, Branch Banking repeatedly and unambiguously informed plaintiffs that continued maintenance of their bank accounts would constitute acceptance of the bank services agreement (and by extension, the arbitration agreement). After receiving this notice, plaintiffs continued to maintain their accounts with Branch Banking. We have recognized that identical conduct in similar contexts constitutes acceptance under Tennessee law. *See, e.g.*, *Seawright v. Am. Gen. Fin. Servs., Inc*., 507 F.3d 967, 970 (6th Cir. 2007) ("We hold that [plaintiff's] knowing continuation of employment after the effective date of the arbitration program constituted acceptance of a valid and enforceable contract to arbitrate.") The same result should follow here.

In reaching a different conclusion, the majority cites our unpublished case *Lee v. Red Lobster Inns of America, Inc.*, 92 F. App'x 158 (6th Cir. 2004). That non-precedential decision is inapplicable here for two reasons. First, the agreement in *Lee* did not instruct the offeree that continuing their course of conduct (in that case, working at a restaurant) would constitute acceptance of the agreement. *Id*. at 163. In fact, we explicitly distinguished *Lee* from "cases in which employer-distributed materials told employees that their continuing to work would constitute acceptance of the employer's dispute resolution plan." *Id*. at 163 n.4. In those cases, "an employee's remaining at work past the effective date of the policy was properly construed as manifestation of an agreement to be bound." *Id*. So too here; by continuing to maintain their accounts at Branch Banking, plaintiffs objectively manifested their consent to arbitration.

Second, the *Lee* plaintiff explicitly informed her employer that she would not agree to arbitrate. *Id*. at 162. In contrast, plaintiffs here did not object to the arbitration agreement at any point in nearly two decades since it was first introduced. Under the circumstances of *Lee*, no reasonable person could have concluded that the offer had been accepted. The facts of this case, however, compel the opposite conclusion.

The majority also unduly focuses on what it calls "the major flaw in the district court's analysis," its failure to consider "whether the BSAs are invalid by virtue of exceeding the scope of the original change-of-terms provision." But Tennessee law allows a written contract to be modified "in accordance with some provision thereof authorizing a change upon specific terms and conditions," *or* "by consent of the parties." *Cronbach v. Aetna Life Ins. Co.*, 284 S.W. 72, 73 (Tenn. 1926). Even if Branch Banking's bank services agreement (and included arbitration agreement) exceeded the scope of the original agreement, the new agreement is still effective in its own right because plaintiffs consented to its terms when they continued to maintain their accounts at the bank.

Finally, the majority condemns Branch Banking's conduct as "the antithesis of good faith and fair dealing." But Branch Banking merely offered terms that plaintiffs accepted. The bank then met its obligations to plaintiffs for sixteen-and-a-half years, paying the 6.5% interest rate until the events that began this litigation. During that time, Branch Banking had every reason to believe that plaintiffs had consented to the arbitration agreement and subsequent amendments. Moreover, the merits of the bank's alleged breach are not before us. Rather, the only issue presented is whether plaintiffs must

perform *their* contractual obligation to arbitrate these claims. Thus, for the purposes of this appeal, it is plaintiffs who are "trying to wriggle out of a commitment made years ago," not Branch Banking.

II.

Second, the arbitration agreement is neither adhesive nor unconscionable.

A.

To be adhesive under Tennessee law, a contract must be offered (1) in a standardized form; (2) on a "take it or leave it" basis; (3) without a realistic opportunity to bargain; and (4) under such circumstances that the consumer cannot obtain the desired product except by acquiescing to the form of the contract. *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996). Plaintiffs, as the parties resisting arbitration, bear the burden of proving the adhesiveness of the arbitration agreement. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (1983).

Nothing suggests that plaintiffs lacked a realistic opportunity to bargain when confronted with the proposed arbitration agreement. As the district court noted, plaintiffs "made no attempt at bargaining or challenging the [arbitration] provisions" in the nearly two decades since these provisions were first introduced into their services agreements, and they do not allege that they were somehow prevented from bargaining with Branch Banking.

This alone is fatal to plaintiffs' claims of adhesiveness. But even if plaintiffs had established this element, they have failed to show that they could not obtain "the desired product" except by acquiescing

to the arbitration agreement. Plaintiffs characterize the "desired product or service" as a bank account with a 6.5% interest rate. In my view, however, the interest rate is better described as one desired term of the service or product, not the service or product itself. The Tennessee Court of Appeals's decision in *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351 (Tenn. Ct. App. 2001) is instructive on this point. There, plaintiff purchased a Chevrolet van from a dealership that required him to agree to arbitrate all claims arising from the sale or financing of the van. *Id*. at 354. When plaintiff later sued over what he believed to be a fraudulent interest rate, the trial court rejected his argument that the arbitration agreement was adhesive and compelled arbitration. *Id*. at 353. The court of appeals affirmed. In relevant part, the court observed that if plaintiff had objected to the arbitration agreement and the dealership "had refused to sell Plaintiff the van, Plaintiff could have gone to another Chevrolet dealership (or any other type of dealership for that matter) and obtained a van elsewhere if he considered the Agreement unacceptable." *Id*. at 360. Thus, the desired product in *Pyburn* was not a Chevrolet van or a van with a certain mileage or a van being offered at a certain price. It was a van. Similarly, the desired product here is not a bank account with a certain interest rate or certain privileges. It is a bank account.

Once the desired product is properly defined, the answer to the next question is obvious: could plaintiffs have obtained a bank account elsewhere without acquiescing to Branch Banking's arbitration agreement? Of course. According to plaintiffs' own expert, they could have obtained a bank account in Sevier County without having to agree to arbitration

at all. Plaintiffs' expert testified that in 2001 (the year of the first arbitration amendment) "none of [the six principal banks doing business in Sevier County] were utilizing provisions in account agreements that would . . . require disputes with the bank to be decided by arbitration." By the time that plaintiffs' bank sent out the second arbitration amendment in 2004, arbitration agreements in Sevier County's banking scene were still "not a common or widespread practice." Even in 2017, only a "few banks in Sevier County may have been utilizing [arbitration agreements]" but arbitration was still not a "common, widespread, or accepted practice by banks in Sevier County."

Each time that plaintiffs were faced with notice of an arbitration agreement, they could have gone to another nearby bank and—according to their expert—received an account that would have preserved their ready access to the courts. Instead, they chose to remain at Branch Banking, with an arbitration agreement and a higher interest rate. Having had ample opportunity to find alternative banking services, plaintiffs cannot now contend that Branch Banking offered the arbitration agreements to them under "such conditions that [they could not have] obtain[ed] the desired product or service except by acquiescing to the [arbitration agreement]." *Buraczynski*, 919 S.W.2d at 320. Accordingly, this arbitration agreement is not adhesive.

B.

But even if the arbitration agreement is adhesive, "[that] does not end [the Court's] inquiry because contracts of adhesion still may be enforceable." *Pyburn*, 63 S.W.3d at 360; *Wallace v. Nat'l Bank of Commerce*, 938 S.W.2d 684, 688 (Tenn. 1996) ("[N]ot

all adhesion contracts are unenforceable."). An adhesive contract's enforceability "generally depends upon whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable." *Buraczynski*, 919 S.W.2d at 320. A contract is unconscionable when the "inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." *Taylor v. Butler*, 142 S.W.3d 277, 285 (Tenn. 2004). "An unconscionable contract is one in which the provisions are so one-sided, in view of all the facts and circumstances, that the contracting party is denied any opportunity for meaningful choice." *Id*. Again, plaintiffs bear the burden of showing unconscionability. *See Green Tree*, 531 U.S. at 91.

Plaintiffs argue that this arbitration provision is beyond the reasonable expectations of an ordinary Sevier County resident because few, if any, other banks in the county require arbitration. I see no reason why this reasonableness determination should be limited to the county level. Doing so would effectively exempt the residents of one Tennessee county from the national and state-wide policies favoring the enforcement of arbitration agreements. *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *Buraczynski*, 919 S.W.2d at 319. Moreover, by the time that Branch Banking first introduced arbitration agreements to plaintiffs, Tennessee courts had enforced arbitration clauses across the spectrum of consumer goods and services, including in healthcare contracts, *Buraczynski*, 919 S.W.2d at 321, car purchase agreements, *Pyburn*, 63 S.W.3d at 362, and

consumer loan agreements, *Berkley v. H&R Block E. Tax Servs., Inc.*, 30 S.W.3d 341, 344 (Tenn. Ct. App. 2001). The Tennessee Supreme Court also acknowledged that, at least as of 2017, "account agreements that contain predispute arbitration agreements [were] ubiquitous among financial services institutions." *Harvey ex rel. Gladden v. Cumberland Tr. & Inv. Co.*, 532 S.W.3d 243, 263 (Tenn. 2017). Simply put, by the time that plaintiffs assented to the operative agreement here, arbitration—particularly arbitration with your bank—was the rule, not the exception.

And the terms of this particular arbitration agreement are neither oppressive nor unconscionable. The 2017 arbitration agreement appeared on the first page of the bank services agreement, under the bold, capitalized heading "**ARBITRATION AGREEMENT**." Before describing the substance of the agreement, there was an additional capitalized warning:

> IT IS IMPORTANT THAT YOU READ THIS ARBITRATION PROVISION CAREFULLY. IT PROVIDES THAT YOU MAY BE REQUIRED TO SETTLE A CLAIM OR DISPUTE THROUGH ARBITRATION, EVEN IF YOU PREFER TO LITIGATE SUCH CLAIMS IN COURT. YOU ARE WAIVING RIGHTS YOU MAY HAVE TO LITIGATE THE CLAIMS IN A COURT OR BEFORE A JURY. YOU ARE WAIVING YOUR RIGHT TO PARTICIPATE IN A CLASS ACTION LAWSUIT, CLASS ACTION ARBITRATION, OR OTHER REPRESENTATIVE ACTION WITH RESPECT TO SUCH CLAIMS.

The banking services agreement then described, in detail, the terms of the arbitration agreement.

Tennessee courts look to eleven factors when considering whether an adhesive arbitration agreement is unconscionable: (1) whether the arbitration agreement is "hidden" in another document; (2) whether the agreement "clearly indicates that by agreeing to arbitration, [plaintiff] is waiving her right to a jury trial," (3) whether anything suggests that plaintiff was "not provided with an opportunity to question the terms of the agreement;" (4) whether plaintiff was aware of other service providers, (5) whether the agreement offers notice "as to the procedure and effect of arbitration" including "the procedure for seeking arbitration, how an arbitrator will be appointed, the binding effect of arbitration, or any of the procedure to be utilized during the arbitration proceedings," (6) whether plaintiff was required to sign the agreement "in an expedient manner," (7) whether the agreement was offered on a "take it or leave it" basis, (8) whether there was "comparatively unequal bargaining power" due to plaintiff's "relative lack of knowledge" of the industry, (9) whether the arbitration agreement provided a method for revocation, (10) whether arbitration agreements are "particularly common" in the industry, and (11) whether the agreement requires both sides to submit claims to arbitration. *See Wofford v. M.J. Edwards & Sons Funeral Home, Inc.*, 490 S.W.3d 800, 822–24 (Tenn. Ct. App. 2015).

Nearly all of the *Wofford* factors weigh against finding unconscionability. Branch Banking put the arbitration agreement front-and-center in the bank services agreement and drew special attention to it with bold letters and a capitalized warning. Although

the agreement was included in another document, it cannot reasonably be described as hidden. Even the most casual reader can scan their eyes halfway down the first page of a document that governs their banking relationship. The all-caps warning clearly indicates plaintiffs' waiver of a jury trial. There is no indication that plaintiffs were not provided with an opportunity to question the terms of the agreement or were forced to agree in an expedient manner. And Plaintiffs were surely aware of other banks to which they could take their business.

The 2017 agreement also offered notice of the arbitration's procedure by stating that "[t]he arbitration shall be administered by JAMS pursuant to its Streamlined Arbitration Rules & Procedures." Although Branch Banking did not specifically articulate these procedures in the agreement, it notified the recipient that "[y]ou may obtain a copy of the rules of the arbitration administrator, including information about consumer arbitration, fees, and instructions for initiation arbitration by contacting JAMS at www.jamsadr.com. Phone: 800-352-5267." And the agreement also required Branch Banking to submit any claims against plaintiffs to arbitration.

Moreover, the Tennessee Supreme Court has acknowledged, at least by the time of the 2017 agreement, "account agreements that contain predispute arbitration agreements [were] ubiquitous among financial services institutions." *Cumberland Trust*, 532 S.W.3d at 263. This is particularly important because "terms that are common in the industry are generally not unconscionable." *Wofford*, 490 S.W.3d at 819 (citation omitted).

Beyond the *Wofford* factors, the "costs to initiate or pursue arbitration" is a "factor to be considered in

determining whether the agreement to arbitrate is enforceable." *Hill v. NHC Healthcare/Nashville, LLC*, No. M2005-01818-COA-R3-CV, 2008 WL 1901198, at *16 (Apr. 30, 2008). But "the party seeking to invalidate an arbitration agreement on the ground that the costs are too great has the burden of proving such costs." *Id.* (citing *Pyburn*, 63 S.W.3d at 363); *see also Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 659–60 (6th Cir. 2003) ("[T]he burden of demonstrating that incurring [large arbitration costs and fees that would deter litigants from seeking to vindicate their rights in the arbitral forum] is likely under a given set of circumstances rests, at least initially, with the party opposing arbitration.") A plaintiff may satisfy this burden by, for example, submitting the "rules and fee schedules" of the possible arbitrators contemplated by the agreement. *Hill*, 2008 WL 1901198, at *16 ("The proof shows that the likely costs to simply initiate arbitration under the agreement are very high, perhaps reaching $18,000.")

Here, plaintiffs have not offered any proof regarding the cost of arbitration. Although the arbitration agreement discusses possible cost allocation, there is no evidence in the record regarding the financial burden that a plaintiff would likely bear to arbitrate a claim. Thus, plaintiffs have not shown that arbitration costs are prohibitive, and we have no basis to conclude that the cost to initiate or pursue arbitration renders this agreement unconscionable.

The majority cites *In re Checking Account Overdraft Litig.*, 685 F.3d 1269 (11th Cir. 2012), a case where the Eleventh Circuit struck down a portion of one of Branch Banking's bank services agreements as unconscionable. This decision is not relevant to our current inquiry because it dealt with entirely different

contractual language. There, the agreement mandated that the customer would be liable for *all* costs that Branch Banking incurred as a result of any dispute (win or lose) involving the customer's account, and that the bank could deduct these costs from the account without prior notice. *Id*. at 1275. Applying South Carolina law, the Eleventh Circuit found this clause unconscionable because (1) it was buried on page fourteen and separated from the arbitration provision, *id*. at 1279–80, and (2) "the notion that a claimant who prevails can be forced to pay the respondent's expense incurred in attempting to avoid liability for its proven wrongdoing . . . contravenes basic expectations derived from intuitive notions of fairness." *Id*. at 1281 (internal quotation marks and citation omitted).

We do not have comparable terms here. The operative arbitration agreement provides that "[t]he arbitrator may, in its award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party." This clause appears on the first page of the bank services agreement, under the bold, capitalized header "**ARBITRATION AGREEMENT**" and under an all-caps warning that "YOU SHOULD READ THIS ARBITRATION PROVISION CAREFULLY." Consistent with this clause, Tennessee allows parties to authorize the arbitrator to allocate costs in its award. Tenn. Code Ann. § 29-5-311. Moreover, the arbitrator is not compelled to award costs and fees at all, as shown by the agreement's use of the permissive "may." The Branch Banking agreement currently before us is a far cry from the one that the Eleventh Circuit found unconscionable in *In re Checking Account*.

We should not second-guess the precise balance struck by the parties, and instead must limit our review to determining unconscionability. Because this arbitration agreement does not "shock the judgment of a person of common sense," or possess terms that are "so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other," or have provisions that are "so one-sided" that plaintiffs were denied "any opportunity for meaningful choice," it is not unconscionable under Tennessee law.

Pursuant to the parties' valid agreement, this case should proceed to arbitration.

III.

For these reasons, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-5174

SEVIER COUNTY SCHOOLS FEDERAL CREDIT UNION; SUSANNE MUNSON; GEOFFREY WOLPERT; CHARLES MCGAHA; CHARLENE MCGAHA; ROBIN NICHOLS; GREGORY NICHOLS; REX NICHOLS; SARAH MORRISON,

Plaintiffs-Appellants,

v.

BRANCH BANKING AND TRUST COMPANY,

Defendant-Appellee.

Before: MOORE, GILMAN, and GRIFFIN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville.

THIS CASE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is REVERSED and REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

SEVIER COUNTY SCHOOLS FEDERAL CREDIT UNION et al., *Plaintiffs*, v. BRANCH BANKING & TRUST COMPANY, *Defendant.*	)	Case No. 3:19-cv-138 Judge Travis R. McDonough Magistrate Judge H. Bruce Guyton

MEMORANDUM OPINION

Before the Court is Defendant Branch Banking & Trust Company's ("BB&T") motion to dismiss and compel arbitration (Doc. 12). For the following reasons, BB&T's motion (*id.*) will be **GRANTED**.

I. BACKGROUND[1]

BB&T is a bank organized under the laws of North Carolina, with branches in many locations, including Sevier County, Tennessee. (Doc. 13, at 2.) Plaintiffs are current or former account holders with BB&T. (*Id.*; Doc. 1-1, at 5.) Plaintiff Sevier County Schools Federal Credit Union is a non-profit organization located in Sevier County, Tennessee. (Doc. 1-1, at 4.) The remaining named plaintiffs are persons residing in Sevier County, Tennessee. (*Id.* at 4–5.)

A. Plaintiffs' Accounts with First National Bank of Gatlinburg

Beginning in 1989, Plaintiffs opened Money Market Investment Accounts ("MMIAs") with First National Bank of Gatlinburg ("FNB"). (*Id.* at 7.) FNB advertised the MMIAs to have a rate of return

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[1] As a preliminary matter, the Court will address Plaintiffs' argument that the exhibits submitted in support of BB&T's motion (Docs. 12-1, 12-2, 12-3, 12-4, 12-5, 12-6) are inadmissible and should not be considered by this Court. (*See* Doc. 28, at 31–33.) Plaintiffs argue that certain portions of the Declaration of BB&T's Vice President, Christopher Powell, should be disregarded because he (1) "does not establish that he has personal knowledge" regarding the issuance of certain documents, (2) "does not state that he worked at BB&T" during all of the relevant time periods, and (3) "does not claim to have examined any records establishing" the issuance of certain documents. (*Id.* at 32.) However, Mr. Powell's declaration specifically states that the facts stated therein "are based on personal knowledge obtained from my personal review of the files, documents, and information of BB&T." (Doc. 12-1, at 2.) The Court is satisfied with this statement of Mr. Powell's basis of knowledge and will consider his declaration and the accompanying documents in its review of Defendant's motion. *See* Fed. R. Evid. 602, 901 (witness testimony can prove personal knowledge and authenticity of evidence).

guaranteed never to fall below 6.5%, subject to the account holder's compliance with certain requirements. (*Id.* at 7, 15.) Upon opening an MMIA, each plaintiff signed an agreement ("MMIA Agreement") with FNB. (*Id.* at 7; Doc. 13, at 2.) Each MMIA Agreement reserved to FNB the right to change its terms:

> Changes in the terms of this agreement may be made by the financial institution from time to time and shall become effective upon the earlier of (a) the expiration of a thirty-day period of posting such changes in the financial institution, or (b) the mailing or delivery of notice thereof to the depositor by the notice in the depositor's monthly statement for one month.

(Doc. 12-2, at 2; Doc. 13, at 2.)

On or about January 22, 1992, FNB sent letters to MMIA-holders, notifying them that FNB would no longer maintain the 6.5% rate of return due to economic pressures. (Doc. 1-1, at 8, 21.) In response to backlash from MMIA-holders, FNB circulated another letter on February 21, 1992. (*Id.* at 8, 22.) The February 21, 1992 letter announced that MMIAs would be discontinued on March 31, 1992, and that existing MMIAs would be closed. (*Id.* at 22.) However, FNB offered to transfer "all or any portion of [the] funds to any other account or a combination of accounts," and provided the following options: (1) account holders could put their funds in "New Money Market Investment Accounts" with a rate of interest that would be set by FNB weekly; (2) they could invest in a "Certificate of Deposit" with an interest rate of 6.5% and a choice of maturity between three months to five years; or (3) they could transfer their funds to

a "Maintenance Account" with all the features of the former MMIAs except that no additional deposits would be allowed. (*Id.*) Each plaintiff chose the third option "after being reassured that the account would forever maintain the guaranteed 6.5% rate." (*Id.* at 8.)

B. BB&T's Transition to Ownership

On or about March 22, 1997, FNB merged with BankFirst of Tennessee ("BankFirst"). (*Id.*; Doc. 13, at 3.) BankFirst continued to pay 6.5% interest in connection with the Maintenance Accounts. (Doc. 1-1, at 8; Doc. 28, at 4.) On or about July 13, 2001, BankFirst merged with and began operating as part of BB&T. (Doc. 1-1, at 8.) BB&T was aware of the Maintenance Accounts and its obligations to former MMIA-holders. (*Id.* at 9.) On or about July 16, 2001, BB&T converted those accounts to Money Rate Savings Accounts ("MRSAs").[2] (*Id.*)

C. Agreements Between Plaintiffs and BB&T

As part of its acquisition of BankFirst in 2001, BB&T provided a welcome letter to each Plaintiff and a "Bank Services Agreement." (Doc. 13, at 3.) The Bank Services Agreement stated that, by maintaining an account with BB&T, account holders agreed to the terms of the agreement. (*Id.*; Doc. 12-3, at 4.) The agreement further stated that its terms could be amended, that amendments would be accomplished by written notice to account holders, and that continued use of an account following notice of an

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[2] BB&T asserts that some of the former MMIAs were also converted into Investor Deposit Accounts (Doc. 13, at 3), though Plaintiffs do not reference any such accounts in their complaint (*see generally* Doc. 1-1).

amendment would constitute acceptance of the amendment. (Doc. 12-3, at 4.) The agreement also included an arbitration provision, which stated, "You and the Bank each have the option of requiring that any dispute or controversy concerning your account be decided by binding arbitration . . . ." (*Id.* at 9.)

BB&T amended the Bank Services Agreement in September 2004 (the "2004 Amendment"). (Doc. 13, at 4.) Among other things, the 2004 Amendment provided that, effective October 28, 2004, the existing arbitration section (Doc. 12-3, at 9) would be replaced with a new, longer section on arbitration (*see* Doc. 12-4, at 2–3). The new section stated:

> Any claim or dispute ("Claim") by either you or us against the other arising from or relating in any way to your account, this Agreement or any transaction conducted at the Bank or any of its affiliates, will, at the election of either you or us, be resolved by binding arbitration. This arbitration provision governs all Claims, whether such Claims are based on law, statute, contract, regulation, ordinance, tort, common law, constitutional provision, or any other legal theory and whether such Claim seeks as remedies money damages, penalties, injunctions, or declaratory or equitable relief.

(*Id.* at 3.) It further stated that "Claims subject to this arbitration provision include Claims regarding the applicability of this provision or the validity of this or any prior Bank Services Agreement." (*Id.*) The 2004 Amendment also stated that continued use of the account after the effective date of the amendment would constitute acceptance of the changes therein. (*Id.* at 2). BB&T sent notice and a copy of the 2004

Amendment to each customer, and Plaintiffs continued to use their accounts. (Doc. 13, at 4.)

On April 13, 2017, BB&T again amended the Bank Services Agreement (the "2017 Amendment"). (*Id.*) The 2017 Amendment made many changes to the Bank Services Agreement, including an amendment to the arbitration provision. The new provision began:

> IT IS IMPORTANT THAT YOU READ THIS ARBITRATION PROVISION CAREFULLY. IT PROVIDES THAT YOU MAY BE REQUIRED TO SETTLE A CLAIM OR DISPUTE THROUGH ARBITRATION, EVEN IF YOU PREFER TO LITIGATE SUCH CLAIMS IN COURT. YOU ARE WAIVING RIGHTS YOU MAY HAVE TO LITIGATE THE CLAIMS IN A COURT OR BEFORE A JURY. YOU ARE WAIVING YOUR RIGHT TO PARTICIPATE IN A CLASS ACTION LAWSUIT, CLASS ACTION ARBITRATION, OR OTHER REPRESENTATIVE ACTION WITH RESPECT TO SUCH CLAIMS.

(Doc. 12-5, at 4.) It went on to state:

> Any dispute, claim, controversy or cause of action, that is filed in any court and that arises out of or relates to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration before one arbitrator at a location mutually agreed upon in the state where your account is

> maintained, or as may be otherwise required under the JAMS Minimum Consumer Standards, which is incorporated by reference herein. . . . If a party elects arbitration, it may be conducted as an individual action only. This means that even if a demand for a class action lawsuit, class arbitration, or other representative action (including a private attorney general action) is filed, the matter will be subject to individual arbitration. Either party may bring a summary or expedited motion to compel arbitration or to stay the applicable litigation of a dispute in any court. Such motion may be brought at any time, and the failure to initiate or request arbitration at the beginning of litigation shall not be construed as a waiver of the right to arbitration. . . .

(*Id.*) The new provision further stated:

> You and the Bank each agree that under this Agreement, you and the Bank are participating in transactions involving interstate commerce which shall be governed by the provisions of the Federal Arbitration Act . . . and not by state law concerning arbitration. . . .

(*Id.* at 5.) The 2017 Amendment, again, provided that continued use of the account after receipt of the notice constituted acceptance of the changes (Doc 12-5, at 4), and Plaintiffs continued to use their accounts following the amendment (Doc. 13, at 5; *see also* Doc. 1-1, at 5).

BB&T sent notice of the 2017 Amendment to each customer. (Doc. 13, at 4.) The notice drew particular attention to the amendment of the arbitration provision, stating "The following paragraph replaces both the second and third paragraphs of the ARBITRATION AGREEMENT section of your Bank Services Agreement," and reproduces the above-reference paragraph that begins with "Any dispute, claim, controversy, or cause of action . . . ." (Doc. 12-6, at 2.)

From its acquisition of ownership in 2001 until January 2018, BB&T honored the 6.5% interest rate for the former MMIAs.[3] (Doc. 1-1, at 9.) Plaintiffs refrained from depositing additional funds into their MRSAs and did not transfer ownership of the accounts. (*Id.*)

However, on or about January 30, 2018, Plaintiffs received notice that the annual percentage rate of their accounts would drop to 1.05% on March 10, 2018. (*Id.*) Plaintiffs were also informed that, after March 31, 2019, the rates would "automatically adjust to BB&T's standard balance tiers, as well as to the current standard variable rate of the interest and [annual percentage yield]." (*Id.* at 9, 26–27.) For all accounts with a balance of $1,000 or more, the "standard balance tiers" reflected an interest rate of 0.01%. (*Id.* at 10, 26–27.)

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[3] The only time the interest rate dropped below the expected percentage was in December 2001, when, due to a system error, the interest rate on some accounts was briefly lowered to 3.32%. (Doc. 1-1, at 9.) Upon discovering the error, BB&T notified the affected account holders, reset the interest rate, and repaid the lost interest. (*Id.* at 9, 24–25.)

D. The Present Action

On March 22, 2019, Plaintiffs filed this action in the Circuit Court for Sevier County, Tennessee, on behalf of themselves and all other persons similarly situated. (Doc. 1-1, at 1, 5.) Plaintiffs allege that BB&T is liable for breach of contract based on its actions in lowering the interest rate on March 10, 2018. (*Id.* at 10.) The action was timely removed to federal court, and, on June 3, 2019, BB&T filed its motion to dismiss and compel arbitration (Doc. 12), which is ripe for the Court's review.

II. STANDARD OF REVIEW

The Federal Arbitration Act ("FAA") allows parties to a contract to agree that certain controversies arising from the contract shall be decided by an arbitrator rather than by a court. *See* 9 U.S.C. § 2. The primary substantive provision of the FAA is § 2, *AT&T Mobility LLC v.* Concepcion, 563 U.S. 333, 339 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)), which provides, in pertinent part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be 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. This section embodies "a liberal federal policy favoring arbitration." *AT&T Mobility*, 563 U.S. at 339 (quoting *Moses H. Cone*, 460 U.S. at 24). The principal purpose of the FAA is to ensure the enforcement of private arbitration agreements according to their terms, and the broader purpose of allowing parties to submit grievances to arbitration is to facilitate "efficient, streamlined procedures tailored to the type of dispute" at issue. *Id.* at 344 (citations omitted); *see also Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000) ("The FAA was designed to override judicial reluctance to enforce arbitration agreements, to relieve court congestion, and to provide parties with a speedier and less costly alternative to litigation.").

When considering a motion to dismiss and to compel arbitration, a district court is responsible for four tasks:

> [F]irst, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending arbitration.

McGee v. Armstrong, --- F.3d ---, 2019 WL 5556756, at *4 (6th Cir. Oct. 29, 2019) (quoting *Stout*, 228 F.3d at 714). Here, Plaintiffs do not assert any federal claims, so only tasks one, two, and four are relevant to the Court's review. (*See* Doc. 1-1, at 10–11).

III. ANALYSIS

BB&T argues that each plaintiff is required to arbitrate for three reasons. (Doc. 12, at 1.) First, BB&T contends that the 2001 Bank Services Agreement and amendments thereto established an agreement to arbitrate. (*Id.*) Second, BB&T contends that the arbitration agreement is "valid, binding, and enforceable under the FAA." (*Id.*) Third, BB&T argues that the claims of each plaintiff fall within the arbitration agreement in the Bank Services Agreement. (*Id.*) Plaintiffs counter that: (1) they did not agree to arbitrate their disputes or waive their option to pursue their claims as a class; (2) any agreement between the parties was a contract of adhesion; and (3) the arbitration agreements therein are unenforceable. (Doc. 28, at 1–2.)

A. Whether the Parties Agreed to Arbitrate

Under the FAA, arbitration is a matter of contract. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (citing *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)). Thus, "courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." *AT&T Mobility*, 563 U.S. at 339 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)) (internal quotation marks omitted).

A party opposing arbitration may bring two types of validity challenges under § 2 of the FAA. *Rent-A-Ctr.*, 561 U.S. at 70; *Buckeye*, 546 U.S. at 444. The party may challenge the validity of the agreement to arbitrate or may challenge the validity of the larger

contract in which the arbitration agreement appears. *Rent-A-Ctr.*, 561 U.S. at 70, *Buckeye*, 546 U.S. at 444. The Supreme Court has held that "only the first type of challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable." *Rent-A-Ctr.*, 561 U.S. at 70. Thus, when a party challenges the validity of the arbitration agreement, as opposed to the contract generally, the court must consider the challenge. *Id.* at 71; *see also Frizzell Constr. Co. v. Gatlinburg, LLC*, 9 S.W.3d 79, 84 (Tenn. 1999) ("[P]arties cannot be forced to arbitrate claims that they did not agree to arbitrate.'").

Here, Plaintiffs argue both that they never agreed to arbitrate and that, even if there was an agreement to arbitrate, such agreement is unenforceable. (Doc. 28, at 10, 18.)

i. Whether the Parties Entered into an Agreement to Arbitrate

The formation of a valid contract in Tennessee requires both mutual assent and consideration. *Acuff v. Baker*, No. W2018-00678-COA-R3-CV, 2019 WL 211922, at *11 (citing Restatement (Second) of Contracts §§ 17, 22). Plaintiffs argue that they never assented to the alleged arbitration agreement and that any such agreement is not supported by consideration. (*See* Doc. 28, at 10–12, 18.)

a. Mutual Assent

It is well settled that, "for a contract to be consummated, the parties must mutually assent to the material terms." *Allstate Ins. Co. v. Tarrant*, 363 S.W.3d 508, 528 (Tenn. 2012). To determine whether there was mutual assent, courts must objectively assess the parties' intent as manifested by their

actions. *Id.* In this case, there is no dispute that each Plaintiff agreed to be bound by terms of the initial MMIA Agreement. (*See* Doc. 28, at 13–14.) Rather, the issue is whether their assent to the term in the MMIA Agreement that "changes in the terms of [the] agreement may be made by the financial institution from time to time" includes assent to the changes in the Banks Services Agreement and subsequent amendments. (*See* Doc. 12-2, at 2.) If not, the question becomes whether Plaintiffs are otherwise bound to the Bank Services Agreement and its amendments by virtue of their continued use of the accounts.

BB&T maintains that it had authority under the MMIA Agreement to add an arbitration provision in the Bank Services Agreement and the amendments. (Doc. 34, at 9.) It contends that it could amend the terms of the MMIA Agreement with thirty days' notice to the account holders. (Doc. 13, at 3.) However, the MMIA Agreement actually stated that any changes to the terms of the agreement by the financial institution.

> shall become effective upon the earlier of (a) the expiration of a thirty-day period of posting such changes in the financial institution, or (b) the mailing or delivery of notice thereof to the depositor by the notice in the depositor's monthly statement for one month.

(Doc. 12-2, at 2.) Plaintiffs argue that BB&T has not shown that the Bank Services Agreement, the 2004 Amendment, or the 2017 Amendment "were ever included in a monthly statement or posted at the bank

branch as required by the [MMIA Agreement]."[4] (Doc. 28, at 5, 13 n.5.)

From the Court's own review of the record, it remains unclear whether these documents were distributed in a manner consistent with the MMIA Agreement. BB&T only asserts that: (1) it "provided" each Plaintiff with a welcome letter and copy of the Bank Services Agreement as part of the acquisition of BankFirst (Doc. 12-1, at 4; Doc. 13, at 3); (2) it "sent" notice of the 2004 amendment and a copy thereof to each Plaintiff (Doc. 12-1, at 4 (stating only that BB&T sent notice of the amendment); Doc. 13, at 4 (stating that BB&T sent notice and a copy)); and (3) it "sent" notice of the 2017 Amendment to each Plaintiff (Doc. 12-1, at 5; Doc. 13, at 4.) The Court is unable to determine whether these documents were sent "by the notice in the depositor's monthly statement" or otherwise posted in the bank as required by the MMIA Agreement.

Accordingly, the Court must consider whether the later agreements between BB&T and Plaintiffs are binding in their own right.

BB&T argues that Plaintiffs accepted the terms of the Bank Services Agreement, the 2004 Amendment, and the 2017 Amendment by their continued use of the accounts after the effective dates. (Doc. 13, at 11.) Plaintiffs counter that their inaction after receipt of the Bank Services Agreement does not amount to

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[4] Plaintiffs also contend that the addition of an arbitration agreement was not contemplated by the language of the MMIA Agreement. (*See* Doc. 28, at 13 –14.) However, because the Court finds that BB&T did not follow the procedures for effectuating an amendment to the MMIA Agreement, it need not consider the substantive reasonableness of the change.

assent to be bound by its terms. (Doc. 28, at 10–12.) It is true that silence or inaction does not amount to acceptance of an offer, "unless the circumstances indicate that such an inference of assent is warranted." *Westfall v. Brentwood Serv. Grp., Inc.*, No. E2000-01086-COA-R3-CV, 2000 WL 1721659, at *5 (Tenn. Ct. App. Nov. 17, 2000). However, BB&T does not rely on Plaintiffs' silence or inaction as acceptance of the terms of the Bank Services Agreement and the amendments. Instead, it contends that the act of continuing to maintain accounts with BB&T after the effective dates constituted assent to those agreements. (*See* Doc. 13, at 11.)

In Tennessee, "mutual assent need not be manifested in writing," but "may be manifested, in whole or in party, by the parties' spoken words or by their actions or inactions." *Burton v. Warren Farmers Co-op*, 129 S.W.3d 513, 521 (Tenn. Ct. App. 2002) (citing *Cole-McIntyre-Norfleet Co. v. Holloway*, 214 S.W. 817, 818 (Tenn. 1919)); *see also Moody Realty Co., Inc. v. Huestis*, 237 S.W.3d 666, 674 (Tenn. Ct. App. 2007) ("The parties' actions or inactions, as well as spoken words, can establish mutual assent."). It follows that signatures of the parties are not necessary to establish a binding contract, but are merely one form of evidence of assent. *Moody Realty*, 237 S.W.3d at 674 (noting that "other manifestations of assent can serve the same purpose in the absence of signature"). "Whether an action constitutes acceptance must be assessed in terms of whether it would lead a reasonable person to conclude that the offer has been accepted." *Rode Oil Co., Inc. v. Lamar Advertising Co.*, No. W2007-02017-COA-R3-CV, 2008 WL 4367300, at *6 (Tenn. Ct. App. Sept. 18, 2008) (citations and internal quotations marks omitted).

But mutual assent should not "be inferred from the unilateral acts of one party or by an ambiguous course of dealing between the parties from which different inferences regarding the terms of the contract may be drawn." *Burton*, 129 S.W.3d at 521 (citing *Jamestowne on Signal, Inc. v. First Fed. Sav. & Loan Ass'n*, 807 S.W.2d 559, 564 (Tenn. Ct. App. 1990)).

While no Tennessee or related federal case directly addresses the circumstances at issue in this case, other courts have found that continuing with a particular course of action can constitute assent to contractual terms.

1. Employment Cases

Cases interpreting Tennessee law that have found that continued employment can amount to assent to be bound by an agreement to arbitrate, even in the absence of a signature or other express assent to the terms of the agreement. *See, e.g.*, *Seawright v. Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967, 970 (6th Cir. 2007); *Fisher v. GE Med. Sys.*, 276 F. Supp. 2d 891, 895 (M.D. Tenn. 2003).

In *Fisher*, the plaintiff had been employed by the defendant, and during his employment a copy of the defendant corporation's dispute-resolution program was mailed to each employee. 276 F. Supp. 2d at 892. The program constituted "a written agreement for the resolution of employment issues," which required that employees engage in mediation prior to filing suit in court. *Id.* The plaintiff was aware of the program and had discussed it with other employees, but did not remember ever receiving a copy of the program. *Id.* However, the written program itself stated that individuals employed at the time of its implementation agreed, "by continuing [their]

employment" to abide by the plan "as a condition of employment." *Id.* (alteration in original). The plaintiff nevertheless argued that he was not bound by the dispute resolution program, because the program "was unilaterally imposed, lacked [the employees'] consent, and lacked the consideration necessary to enforce a contract." *Id.* at 894.

The court found that the plaintiff was bound by the terms of the program. *Id.* at 896. In so finding, it first noted that, in Tennessee, "the terms of an employee handbook may become part of the employee's contract of employment, provided the plan demonstrates that both parties are bound by the rules and regulations therein," and that both the plaintiff and the defendant were bound by the dispute resolution program. *Id.* at 894–95. Second, the court concluded that the employees had agreed to the program procedures "by virtue of their continued employment." *Id.* at 895. The court observed that the plaintiff was aware of the nature of the dispute resolution program, though he claimed that he had not received a copy of it, and that such awareness rendered his continued employment "sufficient acceptance of the agreement to make it a valid contract." *Id.*

In *Seawright*, the United States Court of Appeals for the Sixth Circuit held that the plaintiff-employee's "knowing continuation of employment after the effective date of the arbitration program constituted acceptance of a valid and enforceable contract to arbitrate." 507 F.3d at 970. In that case, the defendant company initially introduced its dispute-resolution program "through a series of announcements and informational meetings," as well as letters and pamphlets that were sent to employees.

Id. at 970–71. The plaintiff had signed an attendance sheet acknowledging that she had attended an informational session and received a copy of the pamphlet, but maintained that she never assented to the program. *Id.* at 971.

The Sixth Circuit observed that, "Tennessee law recognizes the validity of unilateral contracts, in which acceptance is indicated by action under the contract." *Id.* at 972 (quoting *Fisher*, 276 F. Supp. 2d at 895). It emphasized the fact that materials accompanying the arbitration agreement unambiguously stated that continued employment beyond the effective date of the program constituted acceptance of the agreement to arbitrate. *Id.* The court distinguished the facts at issue from those in an unpublished Sixth Circuit case, *Lee v. Red Lobster Inns of Am., Inc.*, 92 F. App'x 158 (6th Cir. 2004), in which the court found that the plaintiff-employee had *not* entered into an agreement to arbitrate. *Seawright*, 507 F.3d at 973. First, the court observed that "the agreement at issue in *Lee* did not contain any provision that stipulated continued employment would constitute acceptances." *Id.*; *see also Lee*, 92 F. App'x at 163 n.4 ("The case at bar is distinguishable, of course, from cases in which employer-distributed materials told employees that their continuing to work would constitute acceptance of the employer's dispute resolution plan.") Second, it noted that "the plaintiff in *Lee* explicitly told her boss that she did not assent to the agreement," whereas the plaintiff in *Seawright* had not. *Seawright*, 507 F.3d at 973. The court was clear, though, that "[the plaintiff's] acceptance came not from her silence in the face of an offer, but from her performance under the contract—that is, her continued employment." *Id.* at 973 n.2.

Still, there are cases interpreting Tennessee law that have held that continued employment did not amount to mutual assent to an arbitration agreement. *See, e.g.*, *Lee*, 92 F. App'x at 162–63 (continued employment did not constitute assent when the agreement did not indicate that continued employment would constitute assent and the employee told her supervisor that she would not agree to arbitrate); *Walker v. Ryan's Family Steak Houses, Inc.*, 289 F. Supp. 2d 916, 935–36 (M.D. Tenn. 2003) (continued employment did not constitute assent when there was strong evidence that employees were given misinformation about the agreement they were signing and it was unclear whether they were ever provided with the material terms of the agreement). However, when the employee was provided with the agreement, the employee did not object to the terms of the agreement, and the agreement specifically stated that continued employment after the effective date would amount to acceptance of the terms of the agreement, Tennessee law treats continued employment as assent to an agreement to arbitrate. *See Seawright*, 507 F.3d at 970; *Fisher*, 276 F. Supp. 2d at 895.

2. Subscription-Service Cases

Courts in neighboring jurisdictions have also treated the continued use of a subscription service as evidence of assent to the terms of the agreement governing that service. *See, e.g.*, *Schwartz v. Comcast Corp.*, 256 F. App'x 515, 518–20 (3d Cir. 2007); *Statchurski v. DirecTV, Inc.*, 642 F. Supp. 2d 758, 764–66 (N.D. Ohio 2009).

In *Stachurski*, the district court found that television-service subscribers agreed to be bound by the terms of the customer agreement, despite their

contentions that they had neither read nor signed the agreement after receiving it. 642 F. Supp. 2d at 764–66. Though the agreement was "stuffed" into their billing statements and was in small type, the court found that the plaintiffs' failure to read the agreement, including the arbitration clause therein, did not defeat contract formation. *Id.* at 765. The court reasoned that, because the agreement stated that continuing to receive the service would amount to acceptance of the terms, the plaintiffs had agreed to the terms by continuing to use the defendant's services. *Id.* at 765–66 (noting that "Plaintiffs did not dispute the terms of the Customer Agreement or cancel Defendant's services after receiving a copy of the original Customer Agreement or any updated copy of the agreement").

In *Schwartz*, the United States Court of Appeals for the Third Circuit held that the plaintiff was bound by the terms of a subscriber agreement, including an arbitration clause, despite his contentions that he had not received a copy of the agreement, because: (1) the defendant service-provider produced evidence of its practice of distributing subscriber agreements; (2) the plaintiff knew the services were being offered pursuant to some agreement with the defendant; and (3) both parties had performed under the agreement—the defendant had provided the service, and the plaintiff had paid the monthly fee. 256 F. App'x at 518–20. The court of appeals even opined that "[w]hether or not [the plaintiff] received a copy of the subscription agreement, he could not accept services he knew were being tendered on the basis of a subscription agreement without becoming bound by that agreement." *Id.* at 518.

On the other hand, some courts have declined to find that continued use of a subscription-based service constituted acceptance of service agreement. For example, in *Schnabel v. Trilegiant Corp.*, 697 F.3d 110 (2d Cir. 2012), the United States Court of Appeals for the Second Circuit concluded that the plaintiff was not bound to an arbitration agreement with an online discount provider when the only notice of the agreement to arbitrate was in an unsolicited email from the provider. *Id.* at 123. The court held that the email, which was received after enrollment, did not put the recipients on "inquiry notice of the terms enclosed in that email and those terms' relationship to a service in which the recipients had already enrolled, *and* that a failure to act affirmatively to cancel the membership will, alone, constitute assent." *Id.* (emphasis in original). The United States Court of Appeals for the Ninth Circuit similarly found that a subscriber to a satellite-radio service was not bound by an arbitration clause in the service's customer agreement when he became a subscriber upon the purchase of a new vehicle and had no knowledge or notice that he was entering into a contractual relationship with the radio service. *Knutson v. Sirius XM Radio, Inc.*, 771 F.3d 559, 566 (9th Cir. 2014) (noting that the plaintiff believed that the subscription "was a complimentary service provided for marketing purposes"). In both of these cases, the courts concluded that the plaintiffs were reasonably unaware that their actions would be covered by an agreement with the defendant at all. *See id.* ("A reasonable person in [the plaintiff's] position could not be expected to understand that purchasing a vehicle from Toyota would simultaneously bind him or her to any contract with Sirius XM, let alone one that contained an arbitration provision . . . ."); *Schnabel*,

697 F.3d at 123 ("[A]n offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious.")

Taken together, these subscription-service cases indicate a trend toward finding assent based on continued use when the subscribers are on notice that use of the service would be governed by a contractual agreement with the service provider, as opposed to finding no contractual agreement based on continued use in the absence of such notice.

3. Application to This Case

Although these Tennessee cases do not directly control the resolution of the case at issue, they counsel toward finding that Plaintiffs assented to be bound by the arbitration agreement. Although they did not sign the agreement or confirm their assent in writing, the Bank Services Agreement and each of the amendments specifically stated that continuing to hold accounts with BB&T would operate as acceptance of the terms. (*See* Doc. 12-3, at 4; Doc. 12-4, at 2; Doc. 125, at 4.) In addition, BB&T has sufficiently demonstrated that Plaintiffs were provided with some form of notice regarding each version of the agreement. (*See* Doc. 13, at 3–4.) Individuals and organizations who maintain accounts at banks would reasonably expect their relationship with the bank to be governed by some sort of agreement and that a bank assuming new ownership would impose its own terms regarding that relationship. Moreover, Plaintiffs do not contend that any of them objected—throughout the course of nearly two decades—to the arbitration provisions in any of the agreements, nor do they contend that copies of the

various agreements were unavailable to them at any time. On these facts, the Court finds that Plaintiffs' continued use of their accounts without objection after the effective dates of the agreement amounts to assent to the terms of the Banks Services Agreement, the 2004 Amendment, and the 2017 Amendment. Because the 2017 Amendment is the most recent agreement to which Plaintiffs assented prior to filing this lawsuit, that version of the arbitration agreement is the one relevant the parties' dispute.

b. Consideration

With respect to Plaintiffs' argument that the Bank Services Agreement and the amendments are not binding because there was no consideration for Plaintiffs' agreement to arbitrate and class action waiver (Doc. 28, at 18), the Court finds that there was adequate consideration to bind Plaintiffs to the terms of the agreements. In Tennessee, "[m]utuality of promises is 'ample' consideration for a contract." *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 358 (Tenn. Ct. App. 2001). Accordingly, there is consideration for an arbitration agreement if both parties agree to be bound by the requirement to arbitrate certain claims. *See id.*; *see also Seawright*, 507 F.3d at 974. Because the arbitration provision in the 2017 Amendment bound both the account holders and the bank (*see* Doc. 12-5, at 4–5), there was adequate consideration for the provision.

ii. Whether the Agreement to Arbitrate is Enforceable

The last clause of § 2 allows arbitration agreements to be declared invalid or unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This clause

permits arbitration agreements, like other contracts, "to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *AT&T Mobility*, 563 U.S. at 339 (citations and internal quotation marks omitted); *Rent-A-Ctr.*, 561 U.S. at 68 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

Here, Plaintiffs argue that, even if there is an arbitration agreement between the parties, the agreement is an unenforceable contract of adhesion. (Doc. 28, at 18.)

a. Whether the Arbitration Agreement is Adhesive

The Tennessee Supreme Court has defined a contract of adhesion as "a standardized contract form offered to consumers of goods and services on essentially a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract." *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996) (quoting *Adhesion Contract*, Black's Law Dictionary (6th ed. 1990)[5]; *Broemmer v. Abortion Servs. of Phoenix Ltd.*, 840 P.2d 1013, 1015 (Ariz. 1992)). The defining characteristic of such contracts in Tennessee is the difference in bargaining power between the two parties that enables one party "to select and control

[5] The current version of Black's Law Dictionary defines "adhesion contract" as "[a] standard- form contract prepared by one party, to be signed by another party in a weaker condition, [usually] a consumer, who adheres to the contract with little choice about the terms." *Adhesion Contract*, Black's Law Dictionary (11th ed. 2019).

risks assumed under the contract" and leaves the other party with "no realistic choice as to its terms." *Id.* (citations omitted).

However, "[a] contract is not adhesive merely because it is a standardized form offered on a take-it-or-leave-it basis." *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 500 (6th Cir. 2004). "Even after *Buraczynski*, Tennessee courts decline to find arbitration provisions adhesive where the consumer fails to prove that refusal to sign would cause some detriment other than not being able to buy from the particular merchant[.]" *Id.* In *Wallace v. National Bank of Commerce*, 938 S.W.2d 684 (Tenn. 1996), the Tennessee Supreme Court held that certain "deposit agreements" between a bank and its account holders were not contracts of adhesion. *Id.* at 687–88. It held that, although the deposit agreements were standardized forms and the opportunity to open an account was presented on a "take-it-or-leave-it" basis, there was no basis for concluding that the plaintiffs lacked realistic choice as to the terms of their banking services because they did not show why they could not have simply opened accounts with other banks. *Id.* Similarly, in *Pyburn*, the Tennessee Court of Appeals found that an arbitration agreement between a car dealer and a purchaser was not adhesive because the purchaser could have refused to sign and gone to another car dealership to obtain the vehicle he wanted. 63 S.W.3d at 360.

Based on these Tennessee cases, the Court finds that the arbitration provision Bank Services Agreement, as amended by the 2017 Amendment, is not a contract of adhesion, because Plaintiffs retained the choice to open accounts with other banks. Nothing in the agreement restricted Plaintiffs' ability to close

their accounts with BB&T and transfer their funds to accounts with other banks. Instead, by stating that continued use of their BB&T accounts would constitute acceptance of the terms, the agreements left open the option that Plaintiffs could reject the terms of the agreements—including the arbitration provisions—by transferring their funds to another bank. (*See* Doc. 12-3, at 4; Doc. 12-4, at 2; Doc. 12-5, at 4.)

Plaintiffs resist this conclusion, contending that they would have lost the favorable 6.5% interest rate had they elected to close their accounts. (*See* Doc. 28, at 23 ("Plaintiffs' desire was to enforce their contracts, not cancel them.").)

Even if, as Plaintiffs contend, their only recourse to avoid arbitration was to move their funds to other banks, they make no allegation that similar rates and services were not available at other banks. In holding that certain bank deposit agreements were not adhesive in *Wallace*, the Tennessee Supreme Court stated:

> It is common knowledge that the banking industry is very competitive. For example, different banks may charge lower fees for some services and higher fees for other services, and they also may charge lower interest rates on loans but higher fees for services, thus providing choices which may appeal to various prospective customers. In the absence of a showing that there was no effective competition in the providing of services among the banks in the area served by the defendants, there is no basis for concluding that the appellants had no

> realistic choice regarding the terms for obtaining banking services.

938 S.W.2d at 688. Thus, the court's understanding of "choice" with regard to banking services incorporated the fact that different banks provide services at varying costs. *See id.* In addition, the court placed the burden of showing lack of realistic choice on the plaintiffs. *See id.* Here, Plaintiffs have failed to allege a lack of "effective competition" in the banking services available in Sevier County. Thus, the Court has no basis to find that Plaintiffs lacked "realistic choice."

Furthermore, even assuming no competitor offered a similar interest rate and Plaintiffs would have forgone the primary benefit of their agreements by moving their funds to a competitor, the fact remains that they took no action for years. There were other options available. They could have, for example, sought relief in court in 2001 when the concept of arbitration was first introduced to them, or within a reasonable time thereafter. Or they could have simply expressed disagreement with the arbitration provisions. They did neither. This lack of opposition to arbitration so long as the bank continued to pay the 6.5% interest rate is all the more reason to conclude that the arbitration provision was not adhesive. Plaintiffs cannot show that they lacked a "realistic opportunity to bargain" because they made no attempt at bargaining or challenging the provision while they were still receiving the favorable rate. *See Buraczynski*, 919 S.W.2d at 320.

Although the Bank Services Agreement and amendments were standardized forms and offered on a "take-it-or-leave-it" basis, Plaintiffs have failed to show that they were offered "under such conditions

that [Plaintiffs] [could not] obtain the desired product or service except by acquiescing to the form of the contract," and are, therefore, not contracts of adhesion.[6] *Buraczynski*, 919 S.W.2d at 320.

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[6] Assuming the agreement is adhesive, Plaintiffs argue that the arbitration provision is unenforceable because it was beyond their reasonable expectations and is unconscionable. (Doc. 28, at 21.) They contend that they "did not have the opportunity to revoke or opt out of their contract with impunity" because they would have lost the 6.5% interest rate had they closed their accounts and that they were not given the opportunity to opt out of arbitration "with no adverse effect on their relationship with BB&T." (Doc. 28, at 23–24.) Plaintiffs also contend that the arbitration agreement was outside of their reasonable expectations because it was buried in the 27-page Bank Services Agreement and the even longer 2017 Amendment. (*Id.* at 24–25.)

Though their arguments regarding unconscionability are couched in the assumption that the arbitration agreement is part of a contract of adhesion, the Court notes that the agreement between the parties is not unconscionable because, as previously stated, Plaintiffs were not denied meaningful choice of banking services. *See Haun v. King*, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984) ("If the provisions are . . . viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable."). Here, the terms were not so one-sided as to deprive Plaintiffs of meaningful choice whether to waive their right to a jury trial. Instead, Plaintiffs chose to bank with BB&T even after receipt of notice of these terms, because they enjoyed the benefit of the 6.5% interest rate.

In addition, the inclusion of a class-action waiver in the arbitration agreement does not render it unconscionable or oppressive. *See Pyburn*, 63 S.W.3d at 365 (holding that the trial court erred "when it determined that the unavailability of class action relief in arbitration was a valid basis for not enforcing" the arbitration agreement").

B. The Scope of the Parties' Agreement to Arbitrate

i. Who Should Decide the Question of Arbitrability?

Before determining whether the dispute falls within the scope of the arbitration agreement, the Court must first determine who should decide the threshold question of arbitrability. *See Henry Schein*, 139 S. Ct. at 527. The Supreme Court has held that this question itself is a matter of contract. *Id.* Under the FAA, it is perfectly permissible for parties "to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes." *Id.* (citing *Rent-A-Ctr.*, 561 U.S. at 68–70; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943–44 (1995)). When parties agree by contract to delegate this threshold question to the arbitrator, the court must respect that agreement. *Id.* at 528; *see also id.* at 529 (noting that this "is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless").

Still, courts "should not assume the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Id.* at 531 (quoting *First Options*, 514 U.S. at 944). The law reverses the presumption with regard to silence or ambiguity when the question is *who* should decide arbitrability rather than *whether* a particular issue is subject to arbitration. *First Options*, 514 U.S. at 944–45. When the question is who should decide arbitrability, silence and ambiguity militate in favor of the court deciding the threshold arbitrability question. *Id.*; *Crossville Med. Oncology, P.C. v. Glenwood Sys., LLC*, 485 F. App'x 821, 823 (6th Cir.

2012). Courts have held that written or otherwise vocalized objections to the arbitration of arbitrability show that a party did not clearly and unmistakably agree to submit the threshold question to the arbitrator. *See First Options*, 514 U.S. at 945; *Crossville*, 485 F. App'x at 823–24.

Here, the arbitration agreement in the 2017 Amendment states that

> Any dispute, claim, controversy or cause of action, that is filed in any court and that arises out of or relates to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, *including the determination of the scope or applicability of this agreement to arbitrate*, shall be determined by arbitration . . .

(Doc. 12-5, at 4 (emphasis added).) The agreement is neither silent nor ambiguous on this issue of who should decide whether a particular issue falls within the scope of the agreement—*i.e.*, is arbitrable. (*See id.*) Instead, the language is clear that such a question is itself subject to arbitration. (*See id.*) In addition, Plaintiffs have not objected at any point to the arbitration of the threshold question of arbitrability. (*See generally* Doc. 28.) Accordingly, the Court finds that the parties clearly and unmistakably agreed to have the arbitrator decide question of arbitrability, and will refrain from deciding this question itself.

C. Whether to Stay or Dismiss Plaintiffs' Claims

The final issue for the Court to resolve is whether to stay or dismiss Plaintiffs' claims pending arbitration. *See McGee*, 2019 WL 5556756, at *4.

Courts in this circuit have recognized that dismissal, rather than a stay of proceedings, can be appropriate when all of the claims in a particular suit will be referred to arbitration. *See Ozormoor v. T-Mobile USA, Inc.*, 354 F. App'x 972, 975 (6th Cir. 2009); *Jacobs Field Servs. North Am., Inc. v. Wacker Polysilicon North Am., LLC*, 375 F. Supp. 3d 898, 915 (E.D. Tenn. 2019); *Doe #1 v. Déjà vu Consulting, Inc.*, No. 3:17-cv-00040, 2017 WL 3837730, at *17 (M.D. Tenn. Sept. 1, 2017). Here, all claims and issues are subject to arbitration, and Plaintiff does not request a stay of the action rather than dismissal. Therefore, the Court concludes that dismissal is appropriate.

IV. CONCLUSION

For the reasons stated above,

1. BB&T's motion to dismiss and compel arbitration (Doc. 12) will be **GRANTED**;
2. It will be **ORDERED** that the parties proceed to arbitration;
3. This action will be **DISMISSED WITHOUT PREJUDICE**; and
4. Plaintiffs' motion for corrective relief pursuant to Federal Rule of Civil Procedure 23(d) (Doc. 42) will be **DENIED AS MOOT**.

SO ORDERED.

/s/ Travis R. McDonough
TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-5174

April 7, 2021

SEVIER COUNTY SCHOOLS FEDERAL CREDIT UNION; SUSANNE MUNSON; GEOFFREY WOLPERT; CHARLES MCGAHA; CHARLENE MCGAHA; ROBIN NICHOLS; GREGORY NICHOLS; REX NICHOLS; SARAH MORRISON,	)	ORDER
Plaintiffs-Appellants,	)	
v.	)	
BRANCH BANKING & TRUST COMPANY,	)	
Defendant-Appellee.	)	

BEFORE: MOORE, GILMAN, and GRIFFIN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has

* Judge White recused herself from participation in this ruling.

requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Griffin would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk