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IN THE COURT OF APPEALS OF INDIANA

Jeffery Neal, on behalf of himself and all others similarly situated,

Appellant-Plaintiff,

v.

Purdue Federal Credit Union,

Appellee-Defendant

December 30, 2022

Court of Appeals Case No. 22A-PL-762

Interlocutory Appeal from the Tippecanoe Circuit Court

The Honorable Sean M. Persin, Judge

Trial Court Cause No. 79C01-1909-PL-118

Crone, Judge.

Case Summary

[1] A member of Purdue Federal Credit Union (PFCU) filed a proposed class-action complaint against PFCU regarding overdraft fees. Jeffrey Neal later replaced that member as the plaintiff and filed his own complaint. PFCU filed a motion to compel arbitration, which the trial court granted on the basis that Neal had failed to opt out of a proposed change to his account agreement with PFCU. Neal argues that the trial court erred. We affirm.

Facts and Procedural History[1]

[2] The relevant facts are undisputed. PFCU "is a member-owned, not-for-profit cooperative and financial institution, which provides account and loan services to its members." Appellant's App. Vol. 2 at 203. In September 2019, PFCU member Noah Shoaf filed a proposed class-action complaint alleging that PFCU improperly assessed and collected overdraft fees on its deposit accounts. In his amended complaint, which was filed in January 2020, Shoaf acknowledged that his checking account with PFCU was governed by a membership and account agreement (the Account Agreement), which contains the following relevant provisions:

[1] We remind Neal's counsel that an appellant's statement of facts "should be a concise narrative of the facts stated in a light most favorable to the judgment and should not be argumentative." *Ruse v. Bleeke*, 914 N.E.2d 1, 5 n.1 (Ind. Ct. App. 2009).

> NOTICES:
> ….
> **b. Notice of Amendments.** *Except as otherwise prohibited by applicable law, the terms of this Agreement are subject to change at any time. [PFCU] will notify you of any changes in terms, rates or fees as required by law.* We reserve the right to waive any term in this Agreement. Any such waiver shall not affect our right to enforce any right in the future.
> **c. Effect of Notice.** Any written notice you give to us is effective when it is actually received by us. Any written notice we give to you is effective when it is deposited in the U.S. mail, postage prepaid and addressed to you at your statement mailing address or when placed in your eDocuments folder in online banking if you are enrolled in electronic statements, unless statute or regulation dictates otherwise.…
> ….
> STATEMENTS:
> ….
> **b. Examination.** You are responsible for examining each statement and reporting any irregularities to [PFCU].…
> ….
> **GOVERNING LAW**
> This Agreement is governed by the Bylaws of [PFCU], federal laws and regulations, the laws, including applicable principles of contract law, and regulations of the state of Indiana, and local clearinghouse rules, as amended from time to time. *To the extent permitted by applicable law, you agree that any legal action regarding this Agreement shall be brought in Tippecanoe County, Indiana.*

Id. at 53-54 (emphases added).

[3] In January 2020, PFCU mailed "to its members their respective December 2019 month and quarterly end statements." *Id*. at 204. Included with the statement

was the following two-sided document (the Arbitration Provision):

PURDUE FEDERAL
CREDIT UNION

PO BOX 1950
WEST LAFAYETTE, IN 47996
765.497.3328 // 800.627.3328

January 1, 2020

Important Notice: *Fee Schedule* Changes Effective Immediately

Effective immediately unless otherwise indicated, the *Fee Schedule* has been revised to include the following changes to Purdue Federal accounts and services.

Account Fees	
International Statement Mailing Fee *(effective April 1, 2020)*	$10/statement
Credit Card	
Foreign Transaction (Traditional Rewards card only) All transactions in U.S. dollars.	Up to 1% of transaction amount
Debit Card	
Foreign Transaction All transactions in U.S. dollars.	Up to 1% of transaction amount

These changes are effective immediately unless otherwise noted. On or after January 1, 2020, you may obtain a copy of the revised *Fee Schedule* at purduefed.com, or by calling 800.627.3328. Your acceptance and agreement to the revised terms will be shown by your continued use of any existing or new account(s) or services after the effective date.

Important Notice: *Your Guide to Member Services* Changes Effective 30 Days After Your Receipt of This Notice.

At Purdue Federal Credit Union (Purdue Federal), we pride ourselves in keeping up with new technologies and rapidly evolving financial services. We have a few changes to share with you regarding *Your Guide to Member Services*, which serves as the agreement between you and Purdue Federal regarding account services. **You can find the entire revised *Guide* on our website at PURDUEFED.COM/GMS.** The specific changes are included below for your convenience:

Updated Digital Banking Services: Updates regarding services available in our new Digital Banking platform that was released in July 2019, including updates to the Electronic Fund Transfers ("Regulation E") section.

Added clarifying language to Overdraft Liability: Overdraft Liability section revised to "A check or ACH debit can be presented for payment multiple times, which is beyond the control of the Credit Union. Each presentment will be charged a separate Non-Sufficient Funds fee."

Added Binding Arbitration and Class Action Waiver section: This new section was added after the existing Governing Law section. It is included on the back of this notice in its entirety and includes a limited-time opt-out provision.

Exhibit 2

App. Vol. II, p. 226

EQUAL HOUSING LENDER Federally insured by NCUA.

PURDUE FEDERAL
CREDIT UNION

BINDING ARBITRATION AND CLASS ACTION WAIVER

RESOLUTION OF DISPUTES BY ARBITRATION: THIS SECTION CONTAINS IMPORTANT INFORMATION REGARDING YOUR ACCOUNTS AND ALL RELATED SERVICES. IT PROVIDES THAT EITHER YOU OR WE CAN REQUIRE THAT ANY DISPUTES BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY TRIAL AND THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION, THE DISPUTE IS SUBMITTED TO A NEUTRAL PARTY, AN ARBITRATOR, INSTEAD OF A JUDGE OR JURY. ARBITRATION PROCEDURES MAY BE MORE LIMITED THAN RULES APPLICABLE IN COURT.

a. **Agreement to Arbitrate Disputes.** Either you or we may elect, without the other's consent, to require that any dispute between us concerning your accounts and the services related to your accounts be resolved by binding arbitration, except for those disputes specifically excluded below. This arbitration agreement is entered into pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 – 16 (the "FAA").
b. **Disputes Covered by Arbitration.** Claims or disputes between you and us arising out of or relating to your account(s), transactions involving your account(s), safe deposit box, and any related service with us are subject to arbitration. Any claims or disputes arising from or relating to this agreement, any prior account agreement between us, or the advertising, the application for, or the approval or establishment of your account are also included. Claims are subject to arbitration, regardless of what theory they are based on or whether they seek legal or equitable remedies. Arbitration applies to any and all such claims or disputes, whether they arose in the past, may currently exist or may arise in the future. All such disputes are referred to in this section as "Claims". The only exception to arbitration of Claims is that both you and we have the right to pursue a Claim in a small claims court instead of arbitration, if the Claim is in that court's jurisdiction and proceeds on an individual basis.
c. **No Class Action or Joinder of Parties.** YOU ACKNOWLEDGE THAT YOU AND WE AGREE THAT NO CLASS ACTION, CLASS-WIDE ARBITRATION, PRIVATE ATTORNEY GENERAL ACTION, OR OTHER PROCEEDING WHERE SOMEONE ACTS IN A REPRESENTATIVE CAPACITY, MAY BE PURSUED IN ANY ARBITRATION OR IN ANY COURT PROCEEDING, REGARDLESS OF WHEN THE CLAIM OR CAUSE OF ACTION AROSE OR ACCRUED, OR WHEN THE ALLEGATIONS OR FACTS UNDERLYING THE CLAIM OR CAUSE OF ACTION OCCURRED. Unless mutually agreed to by you and us, claims of two or more persons may not be joined, consolidated, or otherwise brought together in the same arbitration (unless those persons are joint account holders or beneficiaries on your account and/or related accounts, or parties to a single transaction or related transaction), whether or not the claim may have been assigned.
d. **Right to Reject this Resolution of Disputes by Arbitration Provision.** You have the right to opt out of this agreement to arbitrate if you tell us within 30 days of the opening of your account or the receipt of this notice, whichever is later. To opt out, send us written notice at the following address: Purdue Federal Credit Union, ATTN: LEGAL, PO Box 1950, West Lafayette, IN 47996-1950. Otherwise, this agreement to arbitrate will apply without limitation, regardless of whether 1) your account is closed; 2) you pay us in full any outstanding debt you owe; or 3) you file for bankruptcy.
e. **The Arbitration Proceeding.** The arbitration must be filed with one of the following neutral arbitration forums: American Arbitration Association or JAMS. That organization will apply its code of procedures in effect at the time the arbitration claim is filed. If there is a conflict between that code and this arbitration provision and/or this agreement, this arbitration provision and this agreement will control. If JAMS or the AAA is unable to handle the claim for any reason, then the matter shall be arbitrated by a neutral arbitrator selected by agreement of the parties (or, if the parties cannot agree, selected by a court in accordance with the FAA).
f. **Costs.** The party initiating the arbitration shall pay the initial filing fee. If you file the arbitration and an award is rendered in your favor, We will reimburse you for your filing fee. If there is a hearing, we will pay the fees and costs of the arbitration for the first day of that hearing. All other fees and costs will be allocated in accordance with the rules of the arbitration forum. However, we will advance or reimburse filing and other fees if the arbitrator rules that you cannot afford to pay them or finds other good cause for requiring us to do so, or if you ask us in writing and we determine there is good reason for doing so. Each party shall bear the expense of their respective attorneys, experts, and witnesses and other expenses, regardless of who prevails, but a party may recover any or all costs and expenses from another party if the arbitrator, applying applicable law, so determines.
g. **Right to Resort to Provisional Remedies Preserved.** Nothing herein shall be deemed to limit or constrain our right to resort to self-help remedies, such as the right of set-off or the right to restrain funds in an account, to interplead funds in the event of a dispute, to exercise any security interest or lien we may hold in property, or to comply with legal process, or to obtain provisional remedies such as injunctive relief, attachment, or garnishment by a court having appropriate jurisdiction; provided, however, that you or we may elect to arbitrate any dispute related to such provisional remedies.
h. **Severability, Survival.** These arbitration provisions shall survive (a) termination or changes to your accounts or any related services; (b) the bankruptcy of any party; and (c) the transfer or assignment of your accounts or any related services. If any portion of this Binding Arbitration and Class Action Waiver provision is deemed invalid or unenforceable, the remainder of this Binding Arbitration and Class Action Waiver provision shall remain in force. No portion of this Binding Arbitration and Class Action Waiver provision may be amended, severed, or waived absent a written agreement between you and us.
i. **Applicability.** Arbitration will not apply to your account as long as you are an active duty Service Member.

App. Vol. II, p. 227

Id. at 226-27. In March 2020, PFCU filed an answer to Shoaf's amended complaint, in which PFCU did not invoke the Arbitration Provision.

[4] On December 18, 2020, Neal, who is also a PFCU member, filed a motion to intervene as a substitute class representative and for leave to amend the complaint. The motion stated that Shoaf, who never filed a motion to certify a class, wished to withdraw as class representative. On December 22, 2020, the trial court gave PFCU thirty days to object to Neal's motion. On January 21, 2021, PFCU filed a notice that it had no objection. On February 1, 2021, Neal filed his complaint, designated as a second amended complaint, in which he acknowledged that his checking account with PFCU was governed by the Account Agreement; he did not (and does not) claim that he was unaware of any of its terms.

[5] On March 10, 2021, PFCU filed a motion to compel arbitration, asserting that Neal accepted PFCU's offer to arbitrate by failing to opt out of the Arbitration Provision.[2] Neal filed a response in opposition, asserting that no enforceable arbitration agreement existed and that PFCU had "waived its right to arbitrate by continuing to litigate in court for over a year and by consenting to" the filing of his complaint. Appellant's App. Vol. 3 at 12 (bolding omitted). The trial court held a hearing on the motion, during which Neal's counsel stated that "the fact that [Neal] received the notice" of the Arbitration Provision was "undisputed," but that "the effectiveness of that notice [was] in dispute[.]" Tr.

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[2] PFCU also asserted that Neal accepted its offer to arbitrate by continuing to use his checking account, and PFCU renews this assertion on appeal. *See* Appellee's Br. at 29 (citing Appellant's App. Vol. 2 at 226). As indicated above, however, the only acceptance-by-use provision appears in the notice regarding fee schedule changes. Appellant's App. Vol. 2 at 226. We need not determine whether acceptance by use would nevertheless apply to the Arbitration Provision as a matter of law.

Vol. 2 at 9. In February 2022, the trial court issued an order granting PFCU's motion to compel and staying the proceedings. Neal now appeals.

Discussion and Decision

[6] We review de novo a trial court's ruling on a motion to compel arbitration. *Doe v. Carmel Operator, LLC*, 160 N.E.3d 518, 521 (Ind. 2021).[3] "Both Indiana and federal law recognize a strong public policy favoring enforcement of arbitration agreements." *Tender Loving Care Mgmt., Inc. v. Sherls*, 14 N.E.3d 67, 71 (Ind. Ct. App. 2014). This policy favoring arbitration comes into play "[o]nly after it has been determined that the parties agreed to arbitrate their disputes[.]" *MPACT Constr. Grp., LLC v. Super. Concrete Constructors, Inc.*, 802 N.E.2d 901, 907 (Ind. 2004). "[A]rbitration is a matter of contract, and a party cannot be required to submit to arbitration unless the party has agreed to do so." *Watts Water Techs., Inc. v. State Farm Fire & Cas. Co.*, 66 N.E.3d 983, 988 (Ind. Ct. App. 2016). "Under Indiana contract law, the party seeking to compel arbitration has the burden of demonstrating the existence of an enforceable arbitration agreement." *Id*. at 989. "Once the court is satisfied that the parties contracted to submit their dispute to arbitration, the court is required by statute to compel arbitration." *JK Harris & Co. v. Sandlin*, 942 N.E.2d 875, 884 (Ind. Ct. App. 2011), *trans. denied*.

[3] We remind PFCU's counsel that in an appellee's table of authorities, "[t]he authorities shall be listed alphabetically or numerically, as applicable." Ind. Appellate Rule 46(A)(2), -(B).

See Ind. Code § 34-57-2-3 (requiring court to order arbitration if it finds that parties agreed to arbitrate).

[7] We first address Neal's potentially dispositive argument that PFCU waived its right to compel arbitration. "Even where a written agreement to submit a dispute to arbitration is valid and enforceable, 'the right to require such arbitration may be waived by the parties.'" *JK Harris*, 942 N.E.2d at 884 (quoting *Tamko Roofing Prods., Inc. v. Dilloway*, 865 N.E.2d 1074, 1078 (Ind. Ct. App. 2007)). "Such a waiver need not be in express terms and may be implied by the acts, omissions or conduct of the parties. Whether a party has waived the right to arbitration depends primarily upon whether that party has acted inconsistently with its right to arbitrate." *Id*. (quoting *Tamko*, 865 N.E.2d at 1078). "Waiver is a question of fact under the circumstances of each case." *Id*. (quoting *Tamko*, 865 N.E.2d at 1078).

> In determining if waiver has occurred, courts look at a variety of factors, including the timing of the arbitration request, if dispositive motions have been filed, and/or if a litigant is unfairly manipulating the judicial system by attempting to obtain a second bite at the apple due to an unfavorable ruling in another forum.

Id. (quoting *Tamko*, 865 N.E.2d at 1078).

[8] As he did below, Neal asserts that PFCU "affirmatively waived any right to compel arbitration by litigating this case for more than a year and affirmatively consenting to" the filing of his complaint. Appellant's Br. at 21. We disagree. PFCU litigated the case for more than a year against Shoaf, but PFCU filed its

motion to compel arbitration less than six weeks after Neal replaced Shoaf as the plaintiff and filed his own complaint. We concur with PFCU's assertion that "while Shoaf was the plaintiff, only his individual rights and obligations were at issue, and not Neal's. Therefore, nothing that actually happened *before* Neal became a plaintiff would serve as evidence of any waiver of [PFCU's] right to arbitrate against Neal." Appellee's Br. at 46. *See Doe v. Adams*, 53 N.E.3d 483, 491 (Ind. Ct. App. 2016) (quoting 11 Stephen E. Arthur & Jerome L. Withered, *Indiana Practice Series: Civil Trial Practice* § 18.4 (2015)) ("The general approach in Indiana is that '[b]efore certification, a purported class action is essentially an individual action in which the plaintiff wishes to assert claims as a class representative.'"), *trans. denied*. Neither Shoaf nor Neal ever sought to certify a class, and Neal cites no authority for the proposition that consenting to the substitution of a plaintiff constitutes a waiver of any potential defenses against the new plaintiff. In sum, even if PFCU acted inconsistently with any right it might have had to compel arbitration with Shoaf, the same cannot be said about Neal.[4]

[9] We now address Neal's argument that PFCU "failed to meet its burden of proving a valid agreement to arbitrate in the first place[.]" Appellant's Br. at 26.

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[4] Neal asserts that after he became the plaintiff, PFCU produced "more than 1500 pages of class-wide transactional data relating to the case[,]" which he claims is "inconsistent with an intent to arbitrate individually." Appellant's Br. at 24. PFCU observes that Neal offers "no evidentiary support for this allegation and instead refers only to his counsel's oral assertion at the Motion hearing[,]" and that "even if such production occurred, it must have been a carryover from Shoaf's discovery in compliance with [a] court order granting Shoaf's motion to compel discovery. After all, Neal never issued any discovery." Appellee's Br. at 47.

"When determining whether the parties have agreed to arbitrate a dispute, we apply ordinary contract principles governed by state law." *Green Tree Servicing, LLC v. Brough*, 930 N.E.2d 1238, 1241 (Ind. Ct. App. 2010). "Construction of the terms of a written arbitration contract is a pure question of law, and we conduct a de novo review of the trial court's conclusions in that regard." *Id*. (italics omitted). "In interpreting a contract, we give the language of the contract its plain and ordinary meaning[,]" and we "should attempt to determine the intent of the parties at the time the contract was made by examining the language used to express their rights and duties." *Id*. at 1241-42.

[10] "A contract requires 'offer, acceptance of the offer and consideration.'" *Reitenour v. M/I Homes of Ind., L.P.*, 176 N.E.3d 505, 511 (Ind. Ct. App. 2021) (quoting *Straub v. B.M.T. by Todd*, 645 N.E.2d 597, 598 (Ind. 1994)). "If these elements are present, the parties are generally bound by the terms of the agreement." *Id*. "The modification of a contract, since it is also a contract, requires all the requisite elements of a contract." *Hamlin v. Steward*, 622 N.E.2d 535, 539 (Ind. Ct. App. 1993). "A mutual assent or a meeting of the minds on all essential elements or terms must exist in order to form a binding contract." *Pinnacle Comput. Servs., Inc. v. Ameritech Pub., Inc.*, 642 N.E.2d 1011, 1013 (Ind. Ct. App. 1994). "Generally, the validity of a contract is not dependent upon the signature of the parties, unless such is made a condition of the agreement." *Int'l Creative Mgmt., Inc. v. D & R Ent. Co.*, 670 N.E.2d 1305, 1312 (Ind. Ct. App. 1996), *trans. denied* (1997). "However, some form of assent to the terms of the contract is necessary." *Id*. "Assent to the terms of a contract may be expressed

by acts which manifest acceptance." *Id*. "Whether a contract exists is a question of law." *Buskirk v. Buskirk*, 86 N.E.3d 217, 223 (Ind. Ct. App. 2017).

[11] Pursuant to the Arbitration Provision, which Neal (through his counsel) admitted to receiving,[5] PFCU proposed that either party could require, without the other's consent, the resolution of disputes relating to Neal's account by individual arbitration, instead of by the legal process mentioned in the Account Agreement. PFCU also offered Neal an opportunity to opt out of this proposal—that is, to express his lack of assent—by sending PFCU written notice within thirty days of receiving the Arbitration Provision. Neal failed to do so.

[12] Neal acknowledges that "silence can, in limited circumstances, be used to show a party accepted and assented to an offer[.]" Appellant's Br. at 29 (citing *Muller v. Karns*, 873 N.E.2d 652, 657-58 (Ind. Ct. App. 2012) (citing Restatement

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[5] Given this admission, Neal's suggestion that he did not receive actual notice of the provision is not well taken. For the first time in this proceeding, Neal argues that the form and content of the Arbitration Provision were "not reasonably calculated to inform [him] that PFCU was adding a new arbitration provision or that he was required to take any action or be bound." Appellant's Br. at 33. "It is well settled that an argument presented for the first time on appeal is waived for purposes of appellate review." *Waller v. City of Madison*, 183 N.E.3d 324, 327 n.1 (Ind. Ct. App. 2022). "The rule of waiver in part protects the integrity of the trial court; it cannot be found to have erred as to an issue or argument that it never had an opportunity to consider." *GKC Ind. Theatres, Inc. v. Elk Retail Invs., LLC*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002). Moreover, the primary case on which Neal relies for this argument was recently vacated by the Indiana Supreme Court. *See Decker v. Star Fin. Grp., Inc.*, 187 N.E.3d 937 (Ind. Ct. App. 2022), *trans. granted*. In any event, *Decker* is easily distinguished in that the standalone hard copy of the Arbitration Provision in this case provided much more conspicuous notice of proposed changes than the virtual notice in *Decker,* which appeared on the thirteenth page of the plaintiffs' monthly statement and was accessed via a link in an email that "did not mention changes to the account's Terms and Conditions." *Id.* at 945.

(Second) of Contracts § 69(1) (1981)); *see also* Restatement (Second) of Contracts § 19(1) ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."). Section 69 of the Restatement reads in relevant part,

> (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
>
> > (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.
> >
> > (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
> >
> > (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

Neal asserts that "[n]one of those narrow exceptions applies here." Appellant's Br. at 30.[6]

[13] We disagree. PFCU and Neal had previous dealings that resulted in the execution of the Account Agreement, which provided that its terms were

[6] We note that the Indiana Supreme Court has not cited, let alone specifically adopted, this section of the Restatement, but neither party suggests that it runs counter to current Indiana law.

subject to change at any time, that PFCU would notify Neal of any changes, and that any disputes regarding the agreement would be resolved by legal action in Tippecanoe County. PFCU's offer to change the dispute-resolution portion of the agreement explicitly stated that assent to the Arbitration Provision may be manifested by silence or inaction, and that Neal could opt out of the provision by giving written notice within thirty days without having to close his account.[7] Under these circumstances, we conclude that it was reasonable that Neal should have notified PFCU if he did not intend to accept the offer, and that Neal accepted the offer by remaining silent and inactive past the deadline. *See, e.g.*, *Rivera-Colón v. AT&T Mobility P.R., Inc.*, 913 F.3d 200, 211, 213 n.4 (1st Cir. 2019) (relying in part on subsections 69(1)(b) and -(c) of Restatement in holding that longtime employee accepted employer's emailed offer to arbitrate disputes by remaining silent and failing to exercise opt-out rights by deadline: "Unlike the unsolicited offer-by-mail to which Rivera tries to liken this case, this wasn't an offer made by a stranger."); *Gupta v. Morgan Stanley Smith Barney, LLC*, 934 F.3d 705, 713-14 (7th Cir. 2019) (citing, inter alia, subsection 69(1)(c) of Restatement and *Rivera-Colón*) (same result: "This case does not present an unsolicited offer-by-email from a stranger when the expectation of the offeree's response is rare, if not baseless."); *see also Versmesse v. AT&T Mobility LLC*, No. 3:13 CV 171, 2014 WL 856447, at *6 (N.D. Ind. Mar. 4, 2014) (citing, inter

[7] Neal asserts that the Account Agreement "did not allow [PFCU] to add completely new terms[.]" Appellant's Br. at 39. The Arbitration Provision did not add completely new terms, but merely changed the parties' forum for resolving their disputes. We are unpersuaded by the cases that Neal cites to the contrary, as well as by his suggestion that the Arbitration Provision is ambiguous on this point.

alia, *Int'l Creative Mgmt.*, 670 N.E.2d at 1312) (holding that employee assented to terms of emailed arbitration agreement by failing to opt out by deadline); *Johnson v. Harvest Mgmt. Sub TRS Corp.—Holiday Retirement*, No. 3:15-cv-00026-RLY-WGH, 2015 WL 5692567, at *4 (S.D. Ind. Sept. 25, 2015) (citing *Versmesse*) (same result with agreement sent to employee via postal service and posted on company website).[8]

[14] Finally, we address Neal's claim that PFCU's proposal to amend the Account Agreement with the Arbitration Provision violated a duty of good faith and fair dealing. We reject Neal's characterization of the Arbitration Provision as "unilateral," given that he could have opted out of it without closing his account. Appellant's Br. at 48. In that vein, we also reject Neal's reliance on *Sevier County Schools Federal Credit Union v. Branch Banking & Trust Co.*, 990 F.3d 470 (6th Cir. 2021), *cert. denied* (2022), because the arbitration provision found to be unreasonable in that case did not have an opt-out clause, and thus in order to reject it the plaintiffs would have had to close their accounts bearing "a perpetual 6.5% annual interest rate." *Id*. at 480. Neal's assertion that the *Sevier* court would have found the provision in that case unreasonable even with an

[8] Quoting comment (a) to section 69 of the Restatement, Neal emphasizes that "[a]cceptance by silence is exceptional" and that "[t]he 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." Appellant's Br. at 29. As explained above, this case involves more than the mere receipt of an unsolicited offer, and the foregoing facts imposed a duty on Neal to opt out of the Arbitration Provision if he did not intend to be bound by it.

opt-out clause is inaccurate; the Sixth Circuit acknowledged that other courts had done so, but it did not say that it would have done so. *Id*.

[15] Neal cites no binding precedent for the proposition that Indiana credit unions owe potential or existing members a duty of good faith and fair dealing in forming a contract. *Cf. Citadel Grp. Ltd. v. Wash. Reg'l Med. Ctr.*, 692 F.3d 580, 592 (7th Cir. 2012) ("Unlike the duty of good faith imposed on parties in contract performance, there is no inherent duty of good faith with respect to contract formation."). Nor does he cite any binding precedent for the related assertion that PFCU had a duty to inform him and its other members of Shoaf's proposed class action, for which no class was ever certified. PFCU points out that the Arbitration Provision "specifically inform[ed] its members they would be unable to participate in *any* class action – including 'currently existing' class actions 'REGARDLESS OF WHEN THE CAUSE OF ACTION' was filed – if they did not opt out." Appellee's Br. at 44. Based on the foregoing, we affirm the trial court's grant of PFCU's motion to compel arbitration.

[16] Affirmed.

Bradford, C.J., and Pyle, J., concur.