IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JASON KLEIN, individually, on behalf of all others similarly situated, Plaintiffs, v. VERIZON COMMUNICATIONS, INC., et al., Defendants.	)	Case No. 1:12-cv-00757 (GBL/IDD)

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendants Verizon Communications, Inc., Verizon Online LLC, and Verizon Online-Maryland LLC's (collectively, "Verizon") Motion to Reaffirm Order Compelling Arbitration, or, in the alternative, Motion to Dismiss (Dkt. No. 71). Plaintiff Jason Klein ("Klein") brought this action to challenge Verizon's imposition of a $135 Early Termination Fee ("ETF"), alleging that the ETF is an unlawful liquidated damages penalty in violation of the Virginia Consumer Protection Act, Va. Code § 59.1-200(A)(13).

The key issue before the Court is whether, under Virginia law, where the parties entered into two separate contracts in 2010 and 2011, a modification in 2012 to the terms of the 2011 contract applies to Klein's claims arising under the 2010 contract. The Court holds that the 2012 modification is effective, such that its arbitration clause applies, because the evidence in the record is sufficient to establish the parties' mutual intent to assent to the modification. Because the 2010 Agreement specifies that Verizon can

modify the Agreement by emailing Klein, Verizon did so, and Klein continued to use Verizon's services, the Court grants Verizon's motion to compel arbitration.

Further, because the Court grants Verizon's motion to compel arbitration, the Court need not address whether Verizon's ETF is an unlawful liquidated damages penalty or a valid alternative means of performance. Additionally, the Court need not revisit determinations that it has already made, that still hold true in light of the Fourth Circuit's ruling, and that neither party has made a motion to revisit. Specifically, the Court need not revisit whether the arbitration clause applies retroactively, whether Verizon's Rule 68 Offer of Judgment moots Klein's claims, or whether the arbitration clause is procedurally and substantively unconscionable.[1]

I. BACKGROUND

This Court's previous opinion set forth more fully the background concerning this case. *See Klein v. Verizon Commc'ns, Inc.*, 920 F. Supp. 2d 670, 679 (E.D. Va. 2013) ("*Klein I*"). This opinion sets forth those facts that are relevant to the issue at hand.

In 2010, Klein contracted to receive internet and telephone services from Verizon. To activate Verizon's services, Klein agreed to an initial terms of service agreement ("2010 Agreement"), which contained a choice of law provision dictating that Virginia law governed any contractual disputes. The parties subsequently entered into a second terms of service agreement in 2011 ("2011 Agreement"), which contained the same

[1] To the extent that this Court previously relied upon Maryland law in holding that the arbitration clause is neither procedurally nor substantively unconscionable, Virginia law would produce the same result for the same reasons. *Compare Holloman v. Circuit City Stores, Inc.*, 894 A.2d 547, 560 (Md. 2006) (describing the doctrine of unconscionability under Maryland law), *with Lee v. Fairfax Cty. Sch. Board*, 621 F. App'x 761, 762 (4th Cir. 2015) (per curiam) (quoting *Chaplain v. Chaplain*, 682 S.E.2d 108, 113 (Va. App. 2009)) (describing the doctrine of unconscionability under Virginia law).

choice of law provision. Prior to entering into the 2011 Agreement, Klein terminated the 2010 Agreement. Based on that termination, Verizon charged Klein a $135 ETF.

The 2010 Agreement contained the following relevant terms: (1) Klein and Verizon consented to the "exclusive personal jurisdiction of and venue in" a court in Fairfax County, Virginia; (2) the substantive laws of the Commonwealth of Virginia governed the agreement; and (3) Verizon could only make revisions to the agreement through notices on its website or by email. Specifically, the 2010 Agreement provided:

> From time to time we will make revisions to this Agreement and the policies relating to the Service. We will provide notice of such revisions by posting revisions to the Website Announcements page or sending an email to your primary verizon.net email address, or both. You agree to visit the Announcements page periodically to review any such revisions . . . . [R]evisions to any other terms and conditions [other than increases in monthly price] shall be effective on the date noted in the posting and/or email we send you.

Dkt. No. 14-1 at 3. The 2010 Agreement further provided that after any revisions became effective, continued use of Verizon's services equated to "accept[ing] and agree[ing] to abide" by such revisions.

When Verizon installed the services for Klein in 2010, Verizon erroneously added a second order. As a result, Verizon double-billed Klein from December 2010 until March 2010, when Verizon fixed the problem by deactivating Klein's account. Verizon then charged Klein the ETF and sent him an email confirming the cancellation on March 10, 2011.

Klein did not have internet access for a period of time during March 2011. However, he ultimately created a new account with Verizon later that month when the parties entered into the 2011 Agreement. The 2011 Agreement contained provisions that were essentially identical to the 2010 Agreement as to venue, choice of law, and method

of modification. Neither the 2010 Agreement nor the 2011 Agreement required arbitration to resolve disputes.

On June 20, 2012, Verizon sent Klein an email notifying him of changes to the prior agreements, which, for the first time, included a provision that required the parties to arbitrate disputes ("2012 Notification"). The email provided a link to new terms which, most notably, included arbitration of any disputes. The 2012 Notification included the same modification clause as the 2010 and 2011 Agreements—*i.e.*, periodic revisions noticed by website postings or email, but changed the choice of law, venue, and method of dispute resolution provisions. The choice of law became "the Federal Arbitration Act and the substantive laws of the state of the customer's billing address." And, instead of providing for venue in the court of Fairfax County, Virginia, the 2012 Notification provided:

> YOU AND [APPELLEES] CONSENT TO THE EXCLUSIVE PERSONAL JURISDICTION OF AND VENUE IN AN ARBITRATION OR SMALL CLAIMS COURT LOCATED IN THE COUNTY OF THE CUSTOMER'S BILLING ADDRESS FOR ANY SUITS OR CAUSES OF ACTION CONNECTED IN ANY WAY, DIRECTLY OR INDIRECTLY, TO THE SUBJECT MATTER OF THIS AGREEMENT OR TO THE SERVICE.

Dkt. No. 14-3 at 18-19.

The 2012 Notification further provided, "[T]he terms now require that you and Verizon resolve disputes only by arbitration in small claims court." Dkt. No. 14-2 at 2. The email also stated, "By continuing to use the services after the date of this notice, you accept and agree to abide by the revised terms." *Id.* Additionally, the 2012 Notification included a merger clause stating, "This Agreement . . . constitutes the entire agreement between you and [Verizon] with respect to the subject matter hereto and supersedes any and all prior or contemporaneous agreements . . . ." Dkt. No. 14-3 at 18.

Klein did not open Verizon's email containing the 2012 Notification until July 10, 2012. The following day, on July 11, 2012, Klein filed a class action complaint, alleging that Verizon violated Virginia law by charging the ETF when the 2010 Agreement was terminated. Verizon moved to compel arbitration pursuant to the 2012 Notification, or alternatively, to dismiss the action. This Court granted Verizon's motion to compel arbitration. In doing so, this Court held that the parties effected a valid modification to the 2010 Agreement via the 2012 Notification.

The parties pursued arbitration in 2014. The arbitrator agreed with the Court that Maryland law governed the dispute. The arbitrator ultimately ruled in favor of Verizon. Following arbitration, the Court entered a final judgment in favor of Verizon on June 18, 2014. Klein appealed, and the Fourth Circuit reversed and remanded this case. *See Klein v. Verizon Commc'ns, Inc.*, No. 14-1660, 2017 WL 57788 (4th Cir. Jan. 5, 2017) ("*Klein II*"). In doing so, the Fourth Circuit stated:

> [W]e take issue with the path the district court took to reach this conclusion. Specifically, it failed to abide by the choice of law provision in the 2010 Agreement and apply Virginia law to the question of whether the 2010 Agreement was, in fact, modified by the 2012 Notification. Therefore, we remand with instructions that the district court apply Virginia law, pursuant to the 2010 Agreement, to determine whether that agreement was effectively modified. If the district court determines under Virginia law that the parties assented to the 2012 Notification, then its terms—including the arbitration and choice of law provisions—will apply to this dispute.

Id. at *1.

The Fourth Circuit also stated, "On remand, we leave it to the district court to consider in the first instance the application of Virginia law to the merits of this case." *Id.* at *4.

Upon remand, Verizon moved to reaffirm this Court's order in *Klein I* compelling the parties to arbitrate. However, instead of relying on Maryland law, Verizon now relies upon Virginia law to support its motion. In the alternative, Verizon moves to dismiss the Complaint for failure to state a claim upon which relief can be granted.

II. DISCUSSION

A. Standard of Review

In the Fourth Circuit, a litigant can compel arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, "if he can demonstrate (1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500-01 (4th Cir. 2002) (citation and internal quotation marks omitted). Here, the parties dispute the second element—*i.e.*, the existence of a binding contract to arbitrate this dispute. "It is clear that even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate." *Id.* "Whether a party agreed to arbitrate a particular dispute is a question of state law . . . ." *Id.*

B. Analysis

The Court grants Verizon's motion to compel arbitration because the 2010 Agreement specifies that Verizon can modify the Agreement by emailing Klein, Verizon did so, and Klein continued to use Verizon's services.

In *Klein I*, this Court relied upon Maryland law when stating, "[s]ilence is generally not to be considered an acceptance of an offer unless (1) the parties had agreed previously that silence would be an acceptance, (2) the offeree has taken the benefit of the offer, or (3) because of previous dealings between the parties, it is reasonable that the offeree should notify the offeror if the offeree does not intend to accept." *See Klein I*, 920 F. Supp. 2d at 680. This Court held that Klein assented to the 2012 modification because the 2010 and 2011 Agreements provided that continued use of the service after receipt of contract modification received via email was sufficient to modify the contract, and because Klein continued to use Verizon's services after receipt of the 2012 Notification. On appeal, the Fourth Circuit concluded that this Court should apply Virginia law to determine whether Klein accepted the 2012 Notification—in other words, "whether the 2012 Notification was effective." *Klein II*, 2017 WL 57788, at *4.

Under Virginia law, although silence alone will not serve as acceptance of a contract, parties can demonstrate acceptance through some other "objective manifestation of assent." *See Odyssey Imaging, LLC v. Cardiology Assocs. of Johnston, LLC*, 752 F. Supp. 2d 721, 724 (W.D. Va. 2010) (citing *Phillips v. Mazyck*, 643 S.E.2d 172, 176 (Va. 2007)). Thus, "assent may be inferred from the acts and conduct of the parties." *Durham v. Nat'l Pool Equip. Co. of Va.*, 138 S.E.2d 55, 58 (Va. 1964).

Klein argues that under Virginia law, a "modification cannot occur . . . without the express mutual agreement of the parties." Dkt. No. 74 at 5 (quoting *Powell Mountain Joint Venture v. Moore*, 445 S.E.2d 135, 137 (Va. 1994)). Klein further argues that when implying a contract modification, the circumstances must be sufficient to support a finding of "mutual intention" by "clear, unequivocal and convincing evidence, direct or

implied." Dkt. No. 74 at 5 (quoting *Stanley's Cafeteria, Inc. v. Abramson*, 306 S.E.2d 870, 873 (Va. 1983)). Verizon, on the other hand, contends that the clear and convincing standard applies only in "course of dealing" contracts. Dkt. No. 72 at 13. Second, Verizon argues that this case involves the parties' express agreement on how Verizon would propose modifications and how Klein would demonstrate his assent. *Id.* Third, Verizon asserts that even if the clear and convincing standard applies, such evidence exists here. *Id.*

Verizon principally relies upon two cases from the Virginia Court of Appeals to support the proposition that Klein assented to the 2012 modification: (1) *Orthopaedic & Spine Center v. Muller Martini Manufacturing Corp.*, 737 S.E.2d 544 (Va. App. 2013), and (2) *Reston Surgery Center v. City of Alexandria*, 750 S.E.2d 214 (Va. App. 2013). In *Orthopaedic*, Aetna's agreement with a medical provider gave Aetna the authority to modify the covered services under the agreement, so long as Aetna satisfied a notice provision and the medical provider did not opt-out of the new covered services. 737 S.E.2d at 548. Because Aetna had not followed the proper notice requirements, *Orthopaedic* turned on whether the medical provider's silence in response to Aetna's improper notice, coupled with continuing to cash checks, was sufficient to demonstrate that the doctrine of waiver applied. *Id.* at 549. Similarly, in *Reston*, "[t]he plain language of the contract required Aetna to take specific steps to notify [the medical provider] of [its] participation in new network plans, and Aetna failed to comply with those terms." 750 S.E.2d at 220. In light of Aetna not following the appropriate procedures under the express contract, the *Reston* court held that the litigant "failed to prove by clear and unequivocal evidence that [the medical provider] impliedly modified the agreement." *Id.*

at 222. The circumstances surrounding this case are different than those in *Orthopaedic* and *Reston* because, here, Verizon complied with the terms of the 2010 Agreement by providing Klein with notice of the proposed modification via email.

Both *Orthopaedic* and *Reston* rely upon the Supreme Court of Virginia's holding in *Stanley's* that circumstances evincing mutual intent to modify the terms of a contract must by shown by clear, unequivocal, and convincing evidence. *See Orthopaedic*, 737 S.E.2d at 548; *Reston*, 750 S.E.2d at 221. Here, the Court will assume, without deciding, that the more burdensome standard applies, even though *Stanley's* did not specify whether clear and convincing evidence would have been required under an express-modification theory, such as the one Verizon posits in this case. The Court finds that Klein sufficiently assented to the modifications of the 2012 Notification, including the arbitration clause, because the previous agreement between the parties allowed for contract modification via an email from Verizon and Klein's continued use of Verizon's services. By continuing to use the internet services provided by Verizon, Klein manifested his assent to the 2012 modification under the parameters specifically recognized as reflecting acceptance under the terms of his contract. *See* Dkt. No. 14-1 at 3. It is well settled that manifesting acceptance by engaging in activity explicitly recognized as such in the governing contract provisions is sufficient to demonstrate assent under Virginia law. *See In re Frye*, 216 B.R. 166, 171 (E.D. Va. 1997) (holding that a party may convey his acceptance of a contract to another party "in a variety of ways so long as the actions or conduct can be interpreted objectively as constituting an acceptance").

Likewise, whether Klein read the 2012 Notification in the nearly three-week span during which his use of Verizon's services manifested assent is irrelevant in deciding whether the nature of that assent is valid. Klein was on notice of the possibility of contract modification and the process by which it might occur from the change-in-terms clauses of the 2010 Agreement. His failure to read the 2012 Notification, or even open the message at all, does not invalidate his assent to the contents. *See Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892, 896 (W.D. Va. 2001) ("It is well settled that a party to a written contract is responsible for 'inform[ing] himself of its contents before executing it, . . . and in the absence of fraud or overreaching he will not be allowed to impeach the effect of the instrument by showing that he was ignorant of its contents or failed to read it.'") (quoting *Corbett v. Bonney*, 121 S.E.2d 476, 480 (Va. 1961)).

Klein also relies upon *Stone v. Golden Wexler & Sarnese, PC.*, 341 F. Supp. 2d 189 (E.D.N.Y. 2004), to support his argument that the addition of an arbitration clause falls outside the type of revision contemplated by the parties in the governing provisions of their 2010 and 2011 Agreements.[2] First, the Court notes that although the District

[2] The relevant portion of Verizon's "Verizon Online Terms of Service" reads in full as follows:

> REVISIONS TO THIS AGREEMENT.
> From time to time we will make revisions to this Agreement and the policies relating to the Service. We will provide notice of such revisions by posting revisions to the Website Announcements page or sending an email to your primary verizon.net email address, or both. You agree to visit the Announcements page periodically to review any such revisions. We will provide you with at least thirty (30) days notice prior to the effective date of any increases to the monthly price of your Service or Bundled Service plan (excluding other charges as detailed in Sections 8.1(a)-(d)); revisions to any other terms and conditions shall be effective on the date noted in the posting and/or email we send you. By continuing

Court for the Eastern District of New York applied Virginia law in *Stone*, the authority is nonbinding. Second, the Eastern District of New York's holding is distinguishable from this matter in that the plaintiff's governing customer agreement in *Stone* contained a change-in-terms provision that focused almost exclusively on rate changes. 341 F. Supp. 2d at 197-98. Indeed, in finding that the change-in-terms provision was not sufficiently broad to authorize the addition of an arbitration clause, the Eastern District of New York drew attention to context of the provision, highlighting that "[t]he surrounding sections of the Customer Agreement address such topics as finance charges, credit limits, periodic statements, and membership fees." *Id.*

By contrast, the change-in-terms provision of Klein's 2010 and 2011 Agreements with Verizon includes no such focus. Instead, the provision is expansive in its reference to what terms might be modified, specifying "policies relating to the Service" and "any other terms and conditions." (Dkt. No. 14-1 at 3.) While the Eastern District of New York in *Stone* held that there was "nothing in the Customer Agreement that suggest[ed] that plaintiff intended to grant the Bank such latitude," *Stone*, 341 F. Supp. 2d at 198, here Klein's assent to the 2010 Agreement manifested intent to permit a far broader application of the change-in-terms provision.

In sum, because of Verizon's successful delivery of the 2012 Notification and Klein's continued use of Verizon's services between June 20 and July 10, 2012 reflect valid mutual acceptance of a contact modification under Virginia law, the Court grants Verizon's motion to compel arbitration.

> to use the Service after revisions are effective, you accept and agree to abide by them.

(Dkt. No. 14-1 at 3.)

III. CONCLUSION

The Court grants Verizon's motion to compel arbitration because the 2010 Agreement specifies that Verizon can modify the Agreement by emailing Klein, Verizon did so, and Klein continued to use Verizon's services.

Accordingly, it is hereby

ORDERED that Defendants Verizon Communications, Inc., Verizon Online LLC, and Verizon Online-Maryland LLC's Motion to Reaffirm Order Compelling Arbitration, or in the Alternative, Motion to Dismiss (Dkt. No. 71) is **GRANTED**; it is further

ORDERED that the parties submit this claim to arbitration within sixty (60) days of the date of this Order; and it is further

ORDERED that this case is **STAYED** pending the resolution of the parties' arbitration.

IT IS SO ORDERED.

ENTERED this 9th day of August, 2017.

/s/
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia