

AMERICAN ARBITRATION ASSOCIATION

In the matter of Arbitration Case No.: 01-19-0000-7444

Between

Veronica Bargas, Claimant,

vs.

AXOS Bank, HRB Tax Group, Inc., and

Emerald Finance Services, LLC, Respondents.

AWARD OF ARBITRATOR

I, John A. Darden, was designated Arbitrator in accordance with the arbitration agreement entered into by the above named parties as part of an application for an H & R Block Emerald Prepaid MasterCard (“Card”) to be used solely as a debit card by Claimant. After being duly sworn I conducted a telephonic preliminary hearing on May 6, 2019. At the telephonic hearing each party was represented and the parties waived oral hearings in accordance with the Consumer Arbitration Rules (effective September 1, 2014) of the American Arbitration Association (“AAA”). I have fully reviewed and considered the briefs and documents submitted to me by the parties and I make this Award:

1. Although Claimant’s application for the Card submitted by Respondent as Exhibit R-3 (also identified as R-R) is dated January 28, 2019, all events encompassed by the Demand occurred prior to January 28, 2019. Claimant’s Exhibit 1 contains identical arbitration provisions as Exhibit R-3. Neither party has objected to the Arbitrator’s jurisdiction to proceed or to the arbitration authority of the Arbitrator. The application sets forth the relationship between the Claimant and Respondents for issuance and use of the Card. The Respondent entities are H & R Block related entities. The Card agreement provides that issues of law not controlled by Federal law or regulation are to be construed under the laws of the state of Nevada. While the Claimant attempted to file the arbitration demand on January 31, 2019, the AAA refused to docket the filing and returned the Demand to Claimant. Claimant’s legal counsel advised Respondents of the AAA refusal to docket. As this notification to Respondents was not promptly addressed, Claimant’s legal counsel filed a complaint through the Office of the Comptroller of Currency. Upon referral to Respondents of the complaint by the Office of the Comptroller of Currency, the Respondents cleared the AAA issues and the Claimant was permitted to docket her demand.

2. At the telephonic Preliminary Hearing on May 6, 2019 representatives of both parties were present. As authorized by AAA Consumer Arbitration Rule R-29 the parties agreed that this arbitration will be conducted through the submission of documents without in-person or telephonic hearings. A schedule of submissions was agreed to by the parties with the final submission on June 26, 2019. The parties also agreed that the Arbitrator will provide reasons for

the Arbitrator's Award. The Arbitrator entered an order and scheduling order upon the conclusion of the telephonic hearing. The timely submissions were provided the Arbitrator by the AAA Case Manager with the final submission provided to the Arbitrator by the Case Manager on June 27, 2019. The Arbitrator declared the hearing closed on June 28, 2019.

3. The Claimant asserts a number of theories of liability: (i). Breach of contract, (ii). a Nevada Deceptive Trade Practices Act violation, (iii). Negligence, (iv). an Electronic Funds Transfer Act delayed posting of direct deposit violation, (v). an Electronic Funds Transfer Act improperly declined transaction violation, and, (vi). an Electronic Funds Transfer Act notice of error violation. As a result damages, statutory damages and Regulation E attorneys' fees are requested.

4. Claimant was a security guard residing in Roswell, New Mexico. She executed an application for an H & R Block Emerald Card issued through MasterCard. On November 9, 2018 her social security entitlement was direct deposited onto the Card. By the terms of the Card agreement those funds were to be immediately available to her. On November 11, 2018 at about 3:30 am she attempted a purchase from Whataburger. The transaction was denied although she had a reasonable expectation of availability of funds. Claimant placed calls to the telephone number identified for customer service and informed the representative of the error. Respondent asserts that the call was not noted in the call log. The Arbitrator finds that not appearing on the log of telephone calls does not prove the call was not made as Claimant alleges. No response was received by Claimant within ten (10) working days (as set forth in the Card application) nor within thirteen (13) business days as required by the Electronic Funds Transfer Act.

Claimant later on November 11, 2018, used the Card without problem at an Allsup's convenience store and at a Wal-Mart. The Card was not debited for the Whataburger attempted charge. Claimant provided screen shots from November 25, 2018 as exhibits of Respondents' failures of their internet system to allow her to retrieve data on that day regarding the credits and debits to the Card. These facts do not prove out-of-pocket monetary loss but do prove she was denied the use of her funds at the Whataburger on November 11, 2018. Claimant expressed in her Declaration a concern for her future use of her funds for her own healthcare and wellbeing. However she continued the use of the Card after November 25, 2018 without problem until February 7, 2019.

In addition to her claim of improperly denied transaction on November 11, 2018, Claimant asserts that she was unable to access the funds directly deposited on her behalf to her card. The account statements though February 7, 2019 do not support her allegation. At all times but the Whataburger November 11, 2018 charge she was able to timely withdraw funds through a debit or ATM transaction.

5. Respondents are claimed to be negligent and the Arbitrator finds Respondents owed a duty to Claimant by virtue of the Card's agreement. Other than (i). the failure to pay the debit transaction to Whataburger on November 11, 2018, (ii). the unexplained November 25, 2018 early morning internet issues, and (iii). the failure to provide the explanation required by both the Card agreement and the Electronic funds Transfer Act, there was no duty breached. As to

each of the failure to pay on November 11, 2018, the unexplained internet issues on November 25, 2018 and the failure to provide the error report, there was no monetary damage to Claimant. The Arbitrator will however award statutory damages as discussed later in this Award.

6. Under 12 CFR 205.11(d)(1), a financial institution is required to provide a written explanation of the institutions findings and note the consumer's right to request the documents that the institution relied on in making a determination. The terms and provisions of the Card agreement contain a similar requirement. Respondents failed to respond as required after Claimant's telephone call on November 11, 2018. Claimant eventually determined she required the assistance of legal counsel and engaged legal counsel in this proceeding. He wrote an error demand on December 22, 2018 to Respondent but received an incomplete electronic mail response on January 9, 2019. After following up with a further electronic mail, Claimant's legal counsel received a complete response on January 22, 2019. That follow up to the Respondents' incomplete response the Arbitrator finds is not a new request. The Respondents did not fulfill their statutory obligation to promptly provide copies of the documents upon Claimant's legal counsel's written request under 12 CFR 205.11(e). Respondents as well failed to comply with the thirteen (13) business day requirement of the Electronic Funds Transfer Act. Claimant is therefore entitled to statutory damages for violation of the Electronic Funds Transfer Act (See: 15 USC 1693m).

7. Claimant has not proved fraud or gross negligence. Further the Arbitrator does not find the Claimant's proofs support an award of damages under the Nevada Deceptive Trade Practices Act, NRS 598.0903 to 598.0999.

8. The failure of Respondents to comply with the terms and conditions of the Card application, including not making available arbitration with the AAA until pressure was brought to bear by Claimant's legal counsel to the Office of the Comptroller of Currency is a breach of Claimant's contract rights with Respondents. There being no actual monetary damages proven, the Arbitrator may nonetheless award statutory damages and Claimant's legal fees.

9. Any limitation of damages provision in the parties' Card agreement does not preclude damages authorized by the Electronic Funds Transfer Act and Regulation E.

10. As to the various claims made by Claimant, it is important to note that she continued to use the card through February 7, 2019 with no problem. The Arbitrator therefore denies her claim for refund of her original bank fee.

11. Respondents failed to prove by a preponderance of the evidence that the denial of access to the Claimant's own money at Whataburger on November 11, 2018 was an Act of God or a technical malfunction which was known to Claimant at the time she attempted to pay Whataburger.

Accordingly, based on the preceding findings,

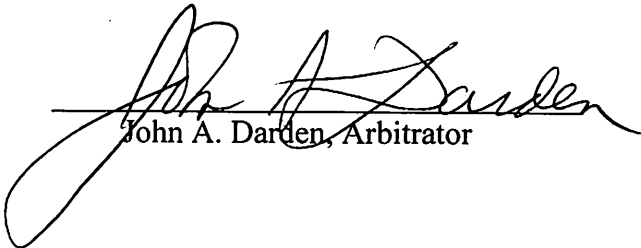
- A. Claimant's claim for damages is denied as to all non-statutory damages;
- B. Claimant's claim for statutory damages is granted in the amount of \$500.00; and,
- C. Claimant's claim for attorney's fees and costs is granted in the amount of \$7,437.50.

All damages are awarded to Claimant and shall be borne by Respondents, jointly and severally.

The administrative fees of the AAA totaling \$1,900.00 and the compensation of the arbitrator totaling \$1,500.00 shall be borne by Respondents, jointly and severally.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted in this Award are hereby denied.

Dated: July 6, 2019


John A. Darden, Arbitrator