AMERICAN ARBITRATION ASSOCIATION | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between

Case Number: 01-20-0009-7578

Nina Inlow (Claimant)
-vs-
Varo Money, Inc. and The Bancorp Bank (Respondents)

AWARD OF ARBITRATOR

I, Pierce E. Cunningham, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn, and oral hearings having been waived in accordance with the Consumer Arbitration Rules of the American Arbitration Association (AAA), and having fully reviewed and considered the written documents submitted to me by the parties, through their counsel of Shannon Hutcheson (Respondents) and Blake Thomas (Claimant), do hereby AWARD, as follows:

Claim I: Unauthorized transactions.

Claimant alleges that she did not authorize the transfer at issue and, thus, it was an unauthorized electronic fund transfer for which she has no liability. 12 C.F.R. § 1005.11(a)(1). An "unauthorized electronic fund transfer" is defined as:

> an electronic fund transfer from a consumer's account initiated by a person other than the consumer without actual authority to initiate the transfer and from which the consumer receives no benefit. The term does not include an electronic fund transfer initiated:
>
> (1) By a person who was furnished the access device to the consumer's account by the consumer, unless the consumer has notified the financial institution that transfers by that person are no longer authorized;
>
> (2) With fraudulent intent by the consumer or any person acting in concert with the consumer . . . .

12 C.F.R. § 1005.2(m). Under the Electronic Funds Transfer Act (EFTA), transfers made by someone who has been furnished access to the account or to the login credentials to the account are "authorized" transfers. 12 C.F.R. § 1005.2(m); *Aikens v. Portfolio Recovery Assocs., LLC,* 716 Fed. App'x 37, 40 (2d Cir. 2017) ("a transfer is not 'unauthorized' under the EFTA when, as here, the consumer, in all probability, furnished the 'means of access' to her bank account.")

The burden of proof is on Respondents to show the disputed transfer, which totaled approximately $440.00, was authorized by Claimant. *See* 15 U.S.C. 1693(g). Here, Respondents offered extensive evidence that Claimant authorized the transfer at issue. *See* Resp. Brief at pp. 2-3.

Based on the evidence submitted Respondents have sustained their burden of proof to establish that Claimant authorized the disputed transfer under the applicable regulation. Accordingly, Claim I is denied.

Claim II: Explanation of Findings.

The issue raised in this claim is whether, based on the evidence, Respondents complied or not with 12 C.F.R. 205.11(d)(1) obligating financial institutions to provide "a written explanation of the institution's findings and shall note the consumer's right to request the documents that the institution relied on in making its determination."

The answer to the question calls for a review of the evidence of record that consists of an e-mail dated June 22 at 3:00 p.m. from Respondents to the Claimant entitled "# 1108098 Claim Update." The e-mail message to Claimant states in pertinent part:

> We have made a final determination regarding your claim and have found no error occurred for the following transaction:
>
> 2020-06-10 21:46:21 Adjustment
> To Wells Fargo Bank 1451 - $ - 440.00.

The e-mail goes on to advise Claimant of her right to request all investigative files from Respondents.

Arbitrator finds that Respondents' obligation to inform the Claimant by "an explanation" has not been met, falls short of compliance with the federal regulation and thereby subjects Respondents to civil liability. The statement that Respondent found no error is not an explanation and fails to satisfy the intent and purpose of the law. The recipient is left to question what in fact is meant by the message. No basis for Respondents' final determination is given when Respondents could have and should have given Claimant the detailed investigation findings it had developed in order to comply. Respondents' representation and offer to Claimant reciting her right to request Respondents' investigation file does not satisfy the obligation to provide an explanation, although it does satisfy the requirement of notice of Claimant's right to request the file.

Based on the cogent and well-reasoned decision of the U.S. Court of Appeals for the District of Columbia Circuit in the case of *Sandra Bisbey v. D.C. National Bank*, 793 F.2d 315 (D.C. Cir. 1986), the Arbitrator is persuaded that Claimant, in spite of the Arbitrator's finding that Claimant authorized the underlying disputed transaction is not barred from recovering for Respondents' lack of compliance with the explanation requirement of Regulation E. *See* Claimant's Reply Brief, p. 13, paragraph 2).

The Arbitrator finds that Claimant Nina Inlow is entitled to an award against Respondents Varo Money, Inc. and The Bancorp Bank, jointly and severally, in the sum of $1,000.00 and an award of attorney's fees in the sum of $4,000.00, in accordance with the stipulation signed by all parties prior to this decision. Claim II is allowed.

Claim III was withdrawn by Claimant.

Claim IV: Response Time – Providing Investigative Documents.

Claimant alleges that she requested investigative documents from Respondents. Respondents, however, offered evidence that, on three separate occasions, they advised Claimant of her right to obtain copies of the documents Respondents used in making their determination on the disputed transfer, but she never requested them. Despite several email exchanges with Respondents, Claimant submitted no documentary evidence that she requested the documents from Respondents, nor did she state when, how or to whom such a request was allegedly made. Indeed, none of the documents submitted by Claimant or Respondents contains or reflects such a request.

As noted above, 12 C.F.R. § 1005.11(d)(1) requires that, upon request, a financial institution "promptly provide" copies of documents that the institution relied on in making its determination. Here, though Claimant claims that she requested such documents, she offers no evidence beyond her sworn declaration. By contrast, Respondents presented significant record evidence demonstrating that, despite repeated offers by Respondents to send

documents, Claimant never requested them. *See* Resp. Brief at pp. 3-4, and Exhibits cited therein.

Based on the foregoing, I find that Claimant failed to avail herself of the right to obtain the investigative documents in this case. Accordingly, Claim IV is denied.

Claim V: Failure to Investigate.

Claimant alleges that Respondents' investigation of her dispute did not comply with the requirements of the EFTA. Regulation E, 12 CFR § 1005.11(c) sets forth the "procedures for resolving errors" under the EFTA, which the U.S. Consumer Financial Protection Bureau has further explained in the official comments. Comment 5 requires the financial institution, in relevant part, to "review any relevant information within the institution's own records for the particular account to resolve the consumer's claim."

Here, Respondents offered significant evidence regarding the investigation they performed, including reviewing the documents Claimant submitted with her dispute, as well as their extensive records relating to her account. Indeed, Respondents' document review revealed the extensive evidence outlined in their Brief. *See* Resp. Brief at pp. 2-3. The evidence of an investigation is clearly demonstrated and satisfies compliance with the pertinent federal regulation at issue in this case.

Based on the foregoing, I find that Respondents fully discharged their obligation under the EFTA and Regulation E to investigate Claimant's dispute of the transfer at issue. 12 CFR 1005.11(c) and 15 U.S.C. 1693f(a). Accordingly, Claim V is denied.

Damages/Attorneys' Fees.

Claimant prevailed on Claim II. Accordingly, Claimant is awarded damages in the sum of $1,000.00 and attorney's fees in the sum of $4,000.00 against Respondents Varo Money, Inc. and Bancorp Bank jointly and severally.

The administrative fees of the American Arbitration Association (AAA) totaling $1,900.00 shall be borne as incurred, and the compensation of the Arbitrator totaling $2,500.00 shall be borne as incurred.

The above sums are to be paid on or before fourteen (14) days from the date of this Award. No interest is awarded, either pre- or post-Award.

This Award is in full adjudication of all claims asserted in this Arbitration. All claims not expressly granted herein are hereby denied.

FEBRUARY 12, 2021
Date

Pierce E. Cunningham, Arbitrator

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12 C.F.R. § 1005.2(m). Under the Electronic Funds Transfer Act (EFTA), transfers made by someone who has been furnished access to the account or to the login credentials to the account are "authorized" transfers. 12 C.F.R. § 1005.2(m); *Aikens v. Portfolio Recovery Assocs., LLC*, 716 Fed. App'x 37, 40 (2d Cir. 2017) ("a transfer is not 'unauthorized' under the EFTA when, as here, the consumer, in all probability, furnished the 'means of access' to her bank account.")

The burden of proof is on Respondents to show the disputed transfer, which totaled approximately $440.00, was authorized by Claimant. *See* 15 U.S.C. 1693(g). Here, Respondents offered extensive evidence that Claimant authorized the transfer at issue. *See* Resp. Brief at pp. 2-3.

Based on the evidence submitted Respondents have sustained their burden of proof to establish that Claimant authorized the disputed transfer under the applicable regulation. Accordingly, Claim I is denied.

Claim II: Explanation of Findings.

The issue raised in this claim is whether, based on the evidence, Respondents complied or not with 12 C.F.R. 205.11(d)(1) obligating financial institutions to provide "a written explanation of the institution's findings and shall note the consumer's right to request the documents that the institution relied on in making its determination."

The answer to the question calls for a review of the evidence of record that consists of an e-mail dated June 22 at 3:00 p.m. from Respondents to the Claimant entitled "# 1108098 Claim Update." The e-mail message to Claimant states in pertinent part:

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The e-mail goes on to advise Claimant of her right to request all investigative files from Respondents.

Arbitrator finds that Respondents' obligation to inform the Claimant by "an explanation" has not been met, falls short of compliance with the federal regulation and thereby subjects Respondents to civil liability. The statement that Respondent found no error is not an explanation and fails to satisfy the intent and purpose of the law. The recipient is left to question what in fact is meant by the message. No basis for Respondents' final determination is given when Respondents could have and should have given Claimant the detailed investigation findings it had developed in order to comply. Respondents' representation and offer to Claimant reciting her right to request Respondents' investigation file does not satisfy the obligation to provide an explanation, although it does satisfy the requirement of notice of Claimant's right to request the file.

Based on the cogent and well-reasoned decision of the U.S. Court of Appeals for the District of Columbia Circuit in the case of *Sandra Bisbey v. D.C. National Bank*, 793 F.2d 315 (D.C. Cir. 1986), the Arbitrator is persuaded that Claimant, in spite of the Arbitrator's finding that Claimant authorized the underlying disputed transaction is not barred from recovering for Respondents' lack of compliance with the explanation requirement of Regulation E. *See* Claimant's Reply Brief, p. 13, paragraph 2).

The Arbitrator finds that Claimant Nina Inlow is entitled to an award against Respondents Varo Money, Inc. and The Bancorp Bank, jointly and severally, in the sum of $1,000.00 and an award of attorney's fees in the sum of $4,000.00, in accordance with the stipulation signed by all parties prior to this decision. Claim II is allowed.

Claim III was withdrawn by Claimant.

Claim IV: Response Time – Providing Investigative Documents.

Claimant alleges that she requested investigative documents from Respondents. Respondents, however, offered evidence that, on three separate occasions, they advised Claimant of her right to obtain copies of the documents Respondents used in making their determination on the disputed transfer, but she never requested them. Despite several email exchanges with Respondents, Claimant submitted no documentary evidence that she requested the documents from Respondents, nor did she state when, how or to whom such a request was allegedly made. Indeed, none of the documents submitted by Claimant or Respondents contains or reflects such a request.

As noted above, 12 C.F.R. § 1005.11(d)(1) requires that, upon request, a financial institution "promptly provide" copies of documents that the institution relied on in making its determination. Here, though Claimant claims that she requested such documents, she offers no evidence beyond her sworn declaration. By contrast, Respondents presented significant record evidence demonstrating that, despite repeated offers by Respondents to send

documents, Claimant never requested them. *See* Resp. Brief at pp. 3-4, and Exhibits cited therein.

Based on the foregoing, I find that Claimant failed to avail herself of the right to obtain the investigative documents in this case. Accordingly, Claim IV is denied.

Claim V: Failure to Investigate.

Claimant alleges that Respondents' investigation of her dispute did not comply with the requirements of the EFTA. Regulation E, 12 CFR § 1005.11(c) sets forth the "procedures for resolving errors" under the EFTA, which the U.S. Consumer Financial Protection Bureau has further explained in the official comments. Comment 5 requires the financial institution, in relevant part, to "review any relevant information within the institution's own records for the particular account to resolve the consumer's claim."

Here, Respondents offered significant evidence regarding the investigation they performed, including reviewing the documents Claimant submitted with her dispute, as well as their extensive records relating to her account. Indeed, Respondents' document review revealed the extensive evidence outlined in their Brief. *See* Resp. Brief at pp. 2-3. The evidence of an investigation is clearly demonstrated and satisfies compliance with the pertinent federal regulation at issue in this case.

Based on the foregoing, I find that Respondents fully discharged their obligation under the EFTA and Regulation E to investigate Claimant's dispute of the transfer at issue. 12 CFR 1005.11(c) and 15 U.S.C. 1693f(a). Accordingly, Claim V is denied.

Damages/Attorneys' Fees.

Claimant prevailed on Claim II. Accordingly, Claimant is awarded damages in the sum of $1,000.00 and attorney's fees in the sum of $4,000.00 against Respondents Varo Money, Inc. and Bancorp Bank jointly and severally.

The administrative fees of the American Arbitration Association (AAA) totaling $1,900.00 shall be borne as incurred, and the compensation of the Arbitrator totaling $2,500.00 shall be borne as incurred.

The above sums are to be paid on or before fourteen (14) days from the date of this Award. No interest is awarded, either pre- or post-Award.

This Award is in full adjudication of all claims asserted in this Arbitration. All claims not expressly granted herein are hereby denied.

February 12, 2021
Date

Pierce E. Cunningham, Arbitrator