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AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between

Keishana Clanton (hereinafter "Ms. Clanton")
-vs-
UniRush, LLC and MetaBank (hereinafter "Respondents")

Case Number: 01-17-0005-8556

AWARD OF ARBITRATOR

I, Nikki Baker, 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 Rules, and having fully reviewed and considered the written documents submitted to me by the parties and all exhibits thereto, each represented by counsel, do hereby, FIND as follows:

Ms. Clanton is the owner of a RushCard account. On May 29, 2017, Ms. Clanton gave oral notice to Respondents that certain unauthorized charges were made on her prepaid RushCard card (the "Card"). Ms. Clanton claims that "[t]he unauthorized transactions total[ing] approximately $2,471.78" were made on her Card. (*See* Dec. of Ms. Clanton at ¶ 4.) However, Ms. Clanton concedes in her four Affidavit of Unauthorized Card Transactions (the "Affidavits"), that the Card was in her possession when disputed transactions occurred and that her PIN number was in her head. (*See* Ex. 2.)

At Respondents' request, Ms. Clanton completed the Affidavits. (*Id.*) In the Affidavits, she identifies transactions between May 6, 2017-May 23, 2017. (*Id.*) Next to certain of the transactions, she wrote "mines" or a "? not mines". (*Id.*) Next to other transactions, she did not write anything, presumably to note those transactions that she knew were not authorized by her. (*Id.*) On the last page of the Affidavits, Ms. Clanton wrote "Grand Total should be $1,806.31." (*Id.*) It is not clear to me how Ms. Clanton calculated that amount.

Respondents, either directly or through a third party, sent to Ms. Clanton a letter dated July 13, 2017. (the "July 13 Letter"). (*See* Ex. 3.) In the July 13 Letter, Respondents informed her that they "have made a final determination regarding the claim referenced above." (*Id.*) The referenced claim totaled $2,471.78, which appears to represent all of the charges listed in the Affidavits, not just those that were not designated as "mines". (*Id.*) In the July 13 Letter, Respondents stated that they "concluded no error occurred; therefore, no funds will be credited to your account and this matter is considered closed." (*Id.*) The July 13 Letter further noted that Ms. Clanton could "request a copy of the documents we used in determining the final outcome of the investigation." (*Id.*)

On September 5, 2017, Ms. Clanton sent a letter to Respondents, requesting, among other documents, "any documents relied upon in the investigation, and a transaction history for the dates at issue." (*See* Ex. 4.) The letter was addressed and sent to Cardholder Services, UniRush, LLC, P.O. Box 42482, Cincinnati, OH 45242, which is the address listed in Paragraphs 21 & 25 of the Prepaid Visa RushCard Cardholder Agreement. (*See* agreement attached to Arbitration Demand.) Respondents claim that, upon reviewing their third party's business records, "there is no indication Respondents received the letter attached to Ms. Clanton's Opening Brief, or any other request for investigative

documents from Ms. Clanton." (*See* Ex. A at ¶ 14.) To counter this evidence, Ms. Clanton's attorney submitted a supplemental declaration under penalties of perjury that he placed the September 5 letter in the U.S. mail to the address listed in the letter with the proper postage affixed to the letter. (*See* Supplemental Declaration of Blake Thomas.) Respondents did not provide to Ms. Clanton any additional documents or other information in response to this letter.

In her Arbitration Demand dated September 29, 2017, Ms. Clanton asserts the following four claims against Respondents: (1) Violation of the Electronic Funds Transfer Act, Regulation E (12 C.F.R. 205), Unauthorized Transactions; (2) Violation of the Electronic Funds Transfer Act, Regulation E (12 C.F.R. 205), Explanation of Findings; (3) Violation of the Electronic Funds Transfer Act, Regulation E (12 C.F.R. 205), Response Time—Investigative Documents; and (4) Violation of the Electronic Funds Transfer Act, Regulation E (12 C.F.R. 205), Affidavit/Declaration of Fraud Requirement. Each claim is discussed in turn.

A. Claim I—Unauthorized Transfers.

Under 12 C.F.R. § 205.6(b)(1), if a consumer timely notifies a financial institution of unauthorized electronic fund transfers, the consumer's liability "shall not exceed the lesser of $50 or the amount of unauthorized transfers that occur before notice to the financial institution."[1] Significantly, "the burden of proof is upon the financial institution to show that the electronic fund transfer was authorized..." 15 U.S.C.A. § 1693g(b).

Here, Respondents have not submitted any explanation as to what investigation they or a third party did to confirm whether the transactions were authorized. Respondents did analyze the proximity of certain stores where purchases were made; however, it is unclear whether this analysis played any role in Respondents determining that "no error occurred", as set forth in the July 13 Letter. (*See* Respondents' Response Brief at p. 5.) Nevertheless, for example, they note that an authorized transaction at Victoria's Secret occurred on May 5 at 10:09 p.m. and an allegedly unauthorized transaction occurred at Lids Locker Room just nineteen (19) minutes later. (*Id.* at p. 4.)

Additionally, Respondents note that eleven of the disputed transactions required the user to input the three-digit PIN specific to the Card. (See Ex. A at ¶ 13.) However, Respondents only identify two of those transactions. (*Id.*)

Respondents have failed to meet their burden of proof for several reasons. First, I am very familiar with the area where most of Ms. Clanton's authorized and unauthorized purchases were made and with the mall where the Victoria's Secret, Lids Locker Room, and Shoe Palace stores are located. This mall typically closes at 9:00 p.m. (Monday-Saturday) and 6:00 p.m. on Sundays, except during the holidays.[2] This alone renders Respondents' records questionable. Additionally, for Ms. Clanton to purchase items at Victoria's Secret and walk all of the way to Lids Locker Room and make a purchase in 19 minutes would be doable, but difficult. What's more, it is not entirely clear that Ms. Clanton disputes the Lids Locker Room charge because it is not listed in her Affidavits. (*See* Ex. 2.)

Ms. Clanton does appear to challenge the Shoe Palace charge of $248.69. (*Id.*) However, according to Respondents' records, that charge was made at 11:17 p.m., long after the mall would have closed. Again, Respondents' records do not prove the charges were authorized.

Next, while Respondents provided a statement for Ms. Clanton's purchases in January 2016, they provided no other documentation that would show that the allegedly unauthorized purchases were typical of Ms. Clanton's purchasing history.

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[1] Respondents do not claim that Ms. Clanton's oral or written notice was untimely. In fact, the evidence establishes that Ms. Clanton timely provided both oral and written notice to Respondents. (*See* Section D, *infra*.)

[2] *See* https://www.galleriaatsunset.com/ (last visited April 18, 2018.)

Finally, although Respondents' arguments regarding purchases in a certain small, geographical area may have some merit, they do not explain how or why the charges across town were authorized. For example, Dave & Buster's in Summerlin (charged on May 16) is at least a thirty minute drive from the WalMart Super Center they utilize as a starting point. (*See* Respondents' Response Brief at p. 4.)

As such, I find in favor of MS. CLANTON on the first claim for relief. In this regard, I find that Respondents failed to meet their burden of establishing that all of the disputed charges were authorized by Ms. Clanton. In this regard, I award Ms. Clanton the sum of $1,208.04.[3]

B. Claim II—Explanation of Findings.

Next, Ms. Clanton claims that Respondents violated 12 C.F.R. § 205.11 when they failed to timely provide an adequate written explanation of their findings in the July 13 Letter. (*See* Opening Brief at p. 5.) Pursuant to 12 C.F.R. § 205.11(d)(1), a financial institution's "report of the results of its investigation shall include a written explanation of the institution's findings and shall note the consumer's right to request the documents that the institution relied on it making its determination."

Here, the July 13 Letter only states that Respondents "concluded no error occurred." (*See* Ex. 3.) Respondents argue that the July 13 Letter satisfies the requirements under 12 C.F.R. § 205.11(d)(1). I disagree. There is nothing in the July 13 Letter that would qualify as an "explanation of the institution's findings". Thus, I find in favor of MS. CLANTON on the second claim for relief and award her statutory damages in the amount of $200.00.

C. Claim III—Response Time-Investigative Documents.

Additionally, Ms. Clanton claims that Respondents violated Regulation E when it failed to provide any documents in response to her letter dated September 5, 2017. (*See* Ex. 4.) Pursuant to 12 C.F.R. § 205.11(d)(1), a financial institution is obligated to "promptly provide" copies of any documents that it relied on in making its determination.

Respondents do not claim that any documents were provided to Ms. Clanton. Rather, they argue that they never received a request for investigative documents. (*See* Respondents' Response Brief at p. 12.) However, as Ms. Clanton correctly notes, "there is a presumption that mailed matter, *correctly* addressed, stamped and mailed, was received by the party to whom it was addressed." *Windom v. William C. Ungerer, W.C.*, 903 A.2d 276, 282 (De. 2006) (emphasis in original).[4] "Merely denying receipt does not rebut the presumption, but it may create an issue of fact to be determined by the jury." *Id.*

Here, Ms. Clanton, through the supplemental declaration submitted by Mr. Thomas, has submitted sufficient evidence that her September 5, 2017, letter was mailed, correctly addressed and stamped. Therefore, the presumption is that Respondents received the letter. Respondents did not overcome that presumption. As such, I find that Respondents violated 12 C.F.R. § 205.11(d)(1) when they failed to promptly provide copies of any documents they relied on to make their determination that "no error occurred," and award MS. CLANTON statutory damages in the amount of $200.00.

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[3] To calculate this amount, I added those transactions listed in the Affidavits, excluding any transactions where a "mines" or "? not mines" was noted, excluding the one instance that Respondents provided evidence that a PIN was utilized (the $203.00 ATM withdrawal on May 8), and excluding any obvious duplicate charges. I then deducted $50.00 from the total amount per 12 C.F.R. § 205.6(b)(1).

[4] Pursuant to Section 22 of the Prepaid Visa RushCard Cardholder Agreement, the agreement "will be governed by the law of the State of Delaware except to the extent governed by federal law."

D. Claim IV—Affidavit/Declaration of Fraud Requirement.

Lastly, Ms. Clanton claims that Respondents violated Regulation E by "improperly requiring Claimant to sign an affidavit/declaration of fraud." (*See* Opening Brief at p.7.) I am not persuaded.

12 C.F.R. § 205.11(b)(2) permits financial institutions to require "the consumer to give written confirmation of an error within 10 business days of an oral notice." Ms. Clanton complied with the timing requirements of this provision when she sent the Affidavits on June 12, 2017, ten business days after she provided oral notice of unauthorized charges to Respondents. (*See e.g.*, Ex. 2.) While these documents are titled "Affidavit", they are not required to be notarized. If Respondents required the Affidavits to be notarized, this additional hurdle may be unreasonable and burdensome. *See e.g.*, Federal Reserve Bank of Philadelphia, Compliance Corner: Third Quarter 2006 (stating that "Regulation E does not permit a bank to require documentation such as notarized affidavits, statements, or copies of police reports.") (emphasis in original). Therefore, I find in favor of RESPONDENTS on Ms. Clanton's fourth claim for relief.

Accordingly, I AWARD, as follows:

1. CLAIMANT MS. CLANTON is awarded, and RESPONDENTS shall pay CLAIMANT MS. CLANTON, the sum of $1,608.04 for the actual and statutory damages, as set forth above. RESPONDENTS are jointly and severally responsible for this amount.

2. 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 $750.00 shall be borne as incurred.

3. Pursuant to 15 U.S.C.A. § 1693m(a)(3), CLAIMANT MS. CLANTON is also awarded, and RESPONDENTS shall pay CLAIMANT MS. CLANTON, the reasonable attorneys' fees incurred in the amount of $3,937.50. In this regard, I find that that 11.25 hours is a reasonable and necessary amount of time for Ms. Clanton's counsel to have spent on this Arbitration and that $350.00 is a reasonable and appropriate hourly rate. RESPONDENTS are jointly and severally responsible for this amount.

4. The above sums, totaling Five Thousand Five Hundred Forty-Five Dollars and Fifty-Four Cents ($5,545.54), shall be paid by RESPONDENTS on or before thirty (30) days from the date of this Award.

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

April 20, 2018
Date

Nikki Baker
Nikki Baker, Arbitrator

Subscribed and sworn to before me
this 20th day of April, 2018.

Erin L Parcells
NOTARY PUBLIC
My Commission expires: March 14, 2022

ERIN L. PARCELLS
Notary Public, State of Nevada
No. 06-104446-1
My Appt. Exp. Mar. 14, 2022