



AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between:

Case Number: [REDACTED]

Anthony [REDACTED] (“Claimant”)

-vs-

Varo Bank (“Respondent”)

INTERIM AWARD OF ARBITRATOR

I, [REDACTED], 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, each represented by counsel, do hereby issue this INTERIM AWARD as follows:

This case involves a consumer arbitration demand brought by Claimant Anthony [REDACTED] (“Claimant”) against Respondent Varo Bank (“Varo” or “Respondent”). The case was heard under the AAA Consumer Arbitration Rules, pursuant to a Desk Arbitration Submission process by which the parties submitted briefs, declarations of fact, and extensive supporting exhibits.

Claimant alleges four claims against Varo under the Electronic Funds Transfer Act, Regulation E, 12 C.F.R. § 1005 (the “Act”). Specifically, Claimant alleges that Varo violated the Act by: (1) failing to refund a \$2,000 electronic funds transfer from his account with Varo that occurred on or about August 30, 2021, which he contends was fraudulent and unauthorized; (2) failing to perform a timely and reasonable investigation of this transfer; (3) failing to provide a written explanation of its findings that no unauthorized transaction had occurred (contending that Varo issued only a “cookie cutter denial” of the claim stating only that it “found no error occurred”); and (4) failing to provide him with copies of its investigative documents supporting its finding.

Finding of Facts

After considering the evidence submitted and the parties’ briefs, I make the following findings.

Claimant had a demand deposit bank account with Varo. Claimant alleges that a single fraudulent, unauthorized electronic funds transfer occurred on or about August 30, 2021, when \$2,000 was transferred from his account to another Varo customer, Keith Riley, through what Varo’s records indicate was a “V2V Transfer.” Claimant timely contacted Varo and disputed the charge on or about August 30th, contending that it was unauthorized.

Varo commenced an investigation of the disputed transfer, pursuant to which a Varo agent reviewed a variety of Varo’s internal records relating to the disputed transfer and Claimant’s login history and account history. Among other things, this investigation revealed that:

- the disputed transfer was made using a known device—which Claimant had paired to his account with a secure passcode and his primary device as early as June 3, 2021—to log in and make the transfer;
- The device used to make the disputed transfer had never accessed any other Varo account, including that of the recipient, Keith Riley;
- Claimant or someone apparently authorized by him had accessed Claimant’s account with the exact same device several times in the three months leading up to the disputed transfer, including after other deposits, yet the device never drained the account;
- Claimant’s secret password was used to login for the disputed transaction, without any failed login attempts or password changes, just as had done with the same device a number of times before;
- The disputed transfer was made right after a large payroll deposit and the deposit covered the transfer but did not exhaust the balance or overdraw the account—instead leaving \$944.63;
- The disputed transfer was initiated from an IP address in Georgia, where Claimant resides and where Claimant or someone apparently authorized by him had logged in using the same device and his same secret password a number of times before;
- Keith Riley, the recipient of the disputed transfer, lives in Decatur, Georgia, less than 35 miles from Claimant’s address registered with Varo.
- Claimant, or someone apparently authorized by him, had a history of using his account for undisputed charges in Georgia, and in other locations (including Alaska where he was working at the time of the disputed transfer).
- In July Claimant had made another sizeable payroll deposit into the Varo account, after which there were eight electronic fund transfers made on the following day totaling around \$1,800, with the largest transfer being \$700.

As part of its investigation, Varo did not review anything beyond its records relating to the disputed transaction and Claimant’s account. In particular, Varo did not contact Keith Riley to determine what the disputed transfer was for or whether it was authorized, even though Mr. Riley also was a Varo customer. The \$2,000 disputed transfer was nearly three times as much as the next largest electronic fund transfer that had been made from the account, and was the only one that was made by a “V2V Transfer.”

Claimant contends throughout his briefing that after its investigation Varo responded with only a “cookie cutter denial” that made a conclusory finding of no error in the transfer, without any explanation of its finding. However, Varo presented a September 10, 2021 letter that was emailed to Claimant on September 10, 2022, which provided an explanation for Varo’s finding. This letter stated, in relevant part, that:

Based on our investigation, we determined that the disputed transaction(s) were not “unauthorized.”
The reasons for our determination include:

- No pattern indicating fraud
- No evidence of account compromise
- No evidence of device compromise

Because the disputed transaction(s) were not unauthorized, we concluded that no error occurred on your account. Accordingly, we will not be crediting your account for the disputed transaction(s). At this time, we consider this matter closed.

If you would like to receive any documentation we used in reaching this decision, please fax or write to us at the address provided below with your name and account number.

Claimant does not deny that he received this September 10, 2021 letter; he simply ignores the letter in his briefing. Varo states that it has no record that Claimant ever requested the investigative documents, and Claimant has presented no evidence to suggest that he did prior to retaining a lawyer to pursue his claim.

Claim I, Unauthorized Electronic Funds Transfer

Under the Act, when a customer disputes an electronic fund transfer as unauthorized, the financial institution has a duty to investigate the alleged error, determine whether an error has occurred, and report back the results of its investigation within ten business days. 15 U.S.C. § 1693f(a); 12 CFR § 1005.11(c)(1). “[T]he burden of proof is upon the financial institution to show that the electronic fund transfer was authorized.” 15 U.S.C. § 1693g(b). A financial institution’s “review of its own records regarding an alleged error satisfies the requirements of this section if (i) The alleged error concerns a transfer to or from a third party; and (ii) ***There is no agreement between the institution and the third party for the type of electronic transfer involved.***” 12 CFR §1005(c)(4) (emphasis added).

Here, Varo limited its review to its own records, and concluded that the disputed transfer was authorized in large part because it was made from a known device which had been paired to Claimant’s account with a secure passcode, and from which authorized electronic fund transfers previously had been made from an IP address in Georgia. This would have been a sufficient investigation under 12 CFR §1005(c)(4) if there was no agreement between Varo and Riley, to whom the disputed transfer was made. But the evidence is undisputed that Riley also was a Varo customer. So this safe harbor does not apply in this situation.

I find that under the particular circumstances of this case, including Claimant’s account history, the amount of the disputed transfer, and Riley’s status as a Varo customer, Varo has ***not*** satisfied its burden of proving that the disputed transfer to Riley was authorized by Claimant. Based on Claimant’s account history, the disputed transfer to Riley was unusual in its high amount (\$2,000, nearly three times larger than the next largest transfer that had been made through the account, and far larger than the substantial majority of transfers which were under \$100) and in being made through a VRV transfer. Furthermore, Riley also was a Varo customer. Under these circumstances, I find that the factors relied upon by Varo based solely on review of Claimant’s account were not sufficient to prove that only Claimant or someone authorized by him could have made the disputed transfer. Instead, I find that Varo should have conducted further investigation into the disputed transaction and whether it was authorized; for example, by contacting its own customer, Riley, to inquire as to the purpose and circumstances of the transfer and/or reviewing Riley’s account history for potentially relevant information.¹

Accordingly, I find in favor of Claimant on his Claim I, and award actual damages of \$2,000.

¹ If the disputed transfer had been a smaller amount more typical of the history of authorized transfers that had been made through Claimant’s account prior to August 30, 2021, or had Riley not been a Varo customer, then the investigation conducted by Varo and resulting factors found likely would have been sufficient to support Varo’s finding that the transfer was authorized.

Claims II-IV, Alleged Failure to Conduct a Timely and Reasonable Investigation, to Provide an Explanation for the Denial of the Claim, and to Provide Claimant with Investigative Documents.

I find that Varo's investigation and resulting September 10, 2021 email letter reporting Varo's findings were timely, but that the investigation was not adequate or reasonable to determine that the disputed transfer was authorized, as explained above. Therefore, Claimant is entitled to statutory damages of between \$100 and \$1,000 under 15 U.S.C. § 1693m(a)(2)(A). I find in favor of Varo on Claimant's remaining claims alleging that Varo did not provide an explanation of its finding of no error, and improperly failed to provide Claimant with its investigative documents. The record reflects that Varo's September 10, 2021 letter provided an explanation of its findings, and that Claimant never requested Varo's investigative documents but instead retained a lawyer to pursue his claim.

Accordingly, I award statutory damages of \$250. I deny Claimant's request for treble damages under 15 U.S.C. § 1693f(e), finding that Varo did not act in bad faith or in a manner to otherwise entitle Claimant to treble damages.

Claimant also is entitled to an award of costs and reasonable attorneys' fees, pursuant to 15 U.S.C. § 1693m(a)(3).

The Amount of Interim Award and Procedures for Award of Attorneys' Fees and Costs

For the reasons summarized above, Claimant is awarded \$2,000 in actual damages and \$250 in statutory damages.

This Interim Award is in full settlement of the merits of all claims submitted to this Arbitration, except for the determination of reasonable attorney fees and costs in favor of Claimant as set forth above. The Arbitrator retains jurisdiction to address Claimant's claims for reasonable attorney fees and costs. Claimant shall submit his motion (not to exceed ten double-spaced pages in length) and any documentation supporting or evidencing the amount of attorneys' fees and costs within seven days of the date of this Interim Award. Varo shall submit its response, not to exceed ten double-spaced pages, within seven days of the fee submission. Upon and after such submissions, the matter shall be deemed submitted to the Arbitrator for determination in a Final Award.

This Interim Award shall remain in full force and effect until the Arbitrator renders a Final Award.

October 31, 2022

Date



, Arbitrator