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IN THE COMMON PLEAS COURT OF RICHLAND COUNTY, OHIO

Patricia Nefores,

Plaintiff,

v.

Branddirect Marketing, Inc., et al.,

Defendants

Case No. 00-777-D

Judge James DeWeese

**ORDER OVERRULING  
ARBITRATION**

This Case is brought before the court by the motion of two of the three defendants to compel arbitration. The motion has now been fully briefed and is ready for decision.

About January 1991, plaintiff Patricia Nefores opened a First Card charge card account with FCC National Bank, a subsidiary of Bank One Corporation. On 9-17-99 First USA Bank, N.A. merged into FCC National Bank, and the name of the bank was changed to First USA Bank, National Association.

From time to time before FCC merged with First USA Bank, FCC would unilaterally change the terms of Ms. Nefores' First Card account agreement. It was FCC's position that Ms. Nefores had 15 days to close her card account each time a change was made or she automatically agreed to the change. In December 1998, FCC contends it sent Ms. Nefores a notice imposing an arbitration requirement on her for all her disputes about her card account.

That arbitration provision, printed in fine print, reads as follows in its substantive provisions:

Arbitration - Any claim, dispute or controversy ("Claim") by either you or us against the other, or against the employees, agents or assigns of the other, arising from or relating in

any way to this Agreement or your account, including Claims regarding the applicability of this arbitration clause or the validity of the entire Agreement, shall be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure in effect at the time the Claim is filed. Rules and forms of the National Arbitration Forum may be obtained and Claims may be filed at any National Arbitration Forum office, [www.arb-forum.com](http://www.arb-forum.com), or P.O. Box 50191, Minneapolis, Minnesota 55405, telephone 1-800-474-2371. Any arbitration hearing at which you appear will take place at a location within the federal judicial district that includes your billing address at the time the Claim is filed. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16. Judgment upon any arbitration award may be entered in any court having jurisdiction.

This arbitration agreement applies to all Claims now in existence or that may arise in the future except for: (i) claims that you or we have individually filed in a court before the effective date of the amendment of the Agreement adding this arbitration agreement; (ii) Claims advanced in any judicial class actions that have been finally certified as class actions and where notice of class membership has been given as directed by the court before the effective date of the amendment of the Agreement adding this arbitration agreement; and (iii) Claims by or against any unaffiliated third party to whom ownership of your account may be assigned after default (unless that party elects to arbitrate). Nothing in this Agreement shall be construed to prevent any party's use of (or advancement of any Claims, defenses, or offsets in) bankruptcy or repossession, replevin, judicial foreclosure or any other prejudgment or provisional remedy relating to any collateral, security or property interests for contractual debts now or hereafter owed by either party to the other under this Agreement.

Plaintiff is suing three defendants in this case. It contends that Bank One Corporation and First USA Bank, National Association sold personal information about her to defendant Brand Direct Marketing, Inc. Brand Direct then apparently used that personal information to make unauthorized charges to plaintiff.

Assuming for sake of argument that the arbitration clause imposed by FCC (1) is part of the parties' agreement, and (2) transferred to the First USA Bank, National Association when it acquired plaintiff's First Card account, the court concludes that arbitration provision does not require arbitration of plaintiff's complaint. That provision relates only to a "claim . . . by either you or us against the other, arising from or relating in any way to this Agreement or your account." Defendants point to nothing in the underlying agreement or FCC's unilateral

amendments which includes defendants Bank One Corporation or Brand Direct in the definition of "us" as that term is used in the arbitration provisions. Neither do defendants point to any provision of the agreement that governs the use of plaintiff's personal information. Plaintiff contends the two bank defendants converted personal information about her and sold it to the third defendant. That is not a claim relating to the agreement or plaintiff's account.

Although the court has assumed in the foregoing discussion that the arbitration provision is valid, the court expresses some skepticism in that regard. It was not a product of arm's-length bargaining, but was unilaterally imposed in a fine print document not designed to bring it to plaintiff's attention. In addition it contains provisions which are very one sided in favor of the draftsman, FCC. For example, it purports to require plaintiff to arbitrate all disputes, but it allows the defendant bank to pursue court remedies for repossession, replevin and prejudgment attachment for plaintiff's credit card debts.

Secondly, as plaintiff's attorney points out from the National Arbitration Forum's own Code of Procedure, the defendant has selected an arbitration forum which imposes very substantial charges which could discourage consumers from using its procedures. The "consumer" can recover no more than the amount claimed, but the greater the amount claimed the greater is the fee charged for arbitration. For filing a \$100,000 claim (including interest and attorney fees), the claimant must pay a filing fee of \$1,125. Then she must pay \$1,750 for a hearing on the documents, or \$1,500 first session and \$1,250/additional session for a telephone or on-line participatory hearing, or \$1,750 first session and \$1,500/additional session for an in-person participatory hearing where the arbitrator actually sees the witnesses. In addition there are other charges for things like discovery, subpoenas and expedited hearings. These fees significantly exceed court charges and could discourage filing legitimate claims.

Judgment Entry

It is ordered for the reasons set out above that the joint motion of defendants Bank One Corporation and First USA Bank, National Association to compel arbitration and stay the proceeding is overruled.

  
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Judge James DeWeese

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Judgment Entry was sent by regular U. S. Mail or served according to local rules this 29<sup>th</sup> day of January, 2002 to:

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Secretary to Judge DeWeese