[redacted],

Claimant

v.

BANK ONE TRUST COMPANY, N.A., BANK ONE DELAWARE, N.A., AND CHASE MANHATTAN BANK USA, N.A.,

Respondents

§
§ **Matter in Arbitration**
§ **JAMS Reference No.** [redacted]
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Interim Award on Liability Phase of Arbitration Hearing

Procedural Status

Claimant [redacted] filed this arbitration proceeding against Respondent Chase Manhattan Bank USA, N.A. (hereinafter, Chase) asserting various claims arising out of a $7,000.00 charge on his credit card issued by Chase which he claims was unauthorized. His live pleading asserts claims for breach of contract, Truth in Lending Act Violations, declaratory and injunctive relief, violations of the Fair Credit Reporting Act and its Texas state law counterparts, intentional misrepresentation, negligence, gross negligence, negligent misrepresentation, defamation, and tortious interference with contract. Chase counterclaimed for breach of contract, seeking payment of the amount it claims [redacted] owes on the account.

On December 5, 2005, a hearing was held in Austin, Texas, in this matter to receive testimony on the liability phase of the arbitration. By prior ruling of the arbitrator, the hearing had been bifurcated, with the damages issues to be heard at a later date if the arbitrator found any party liable on any claim. The liability phase of the hearing was continued on December 14, 2006, via a telephone hearing, for the purpose of receiving the testimony of Rose Malbon. At the request of the parties, the liability phase of the hearing was held open in order to allow the parties to submit post-hearing briefing on the liability issues. The undersigned arbitrator received the final brief on January 20, 2006. This award contains the arbitrator's rulings on the liability issues.

Factual Background

The following facts, established at the arbitration hearing, are relevant to this interim

award. Claimant, [redacted], is a consumer who opened a credit card account (account number XXXXXX7356, hereinafter "[redacted] Chase credit card") with First USA Bank N.A., which later changed its name to Bank One Delaware, N.A. Respondent Chase is the successor by merger to Bank One Delaware, N.A. At all times relevant to this dispute, [redacted] resided in Austin, Texas.

The cardmember agreement that governs the parties' relationship was admitted into evidence as Respondent's Exhibit 1. Pursuant to that agreement, [redacted] is obligated to pay all authorized charges to his account.

[redacted] is an Iranian political activist who is opposed to the current Iranian government. Rang-A-Rang operates a television station in Vienna, Virginia. During a several month period beginning in May 2003, [redacted] appeared several times as a guest on a program aired by Rang-A-Rang, at Rang-A-Rang's invitation.

On July 21, 2003, Rang-A-Rang charged $7,000.00 to [redacted]'s Chase credit card. This charge appeared on [redacted]'s credit card statement covering the period July 18, 2003-August 18, 2003. [redacted] telephoned Bank One and disputed the charge on or about August 25, 2003. [redacted] denied purchasing or authorizing the purchase of any goods or services from Rang-A-Rang.

On August 25, 2003, Chase sent [redacted] a letter acknowledging the telephone call and requesting that he complete and return a Chase form entitled "Type of Dispute: Services Not Received." On September 8, 2003, Chase received the form that [redacted] had completed at Chase's request, and on September 12, 2003, Chase sent [redacted] a letter informing him that it was investigating his dispute.

On or about September 22, 2003, Chase received an invoice from Rang-A-Rang describing services rendered to [redacted] for primetime commentary and followup rerun. Chase mailed a letter to [redacted] on October 19, 2003, enclosing the invoice and asking [redacted] to complete a form attached to the letter and return it by November 6, 2003. In the meantime, [redacted], who had not yet received Chase's October 19, 2003, letter, spoke with a Chase representative and learned of the existence of the invoice. [redacted] wrote Chase on October 20, 2003, disputing the validity of the invoice and claiming that Rang-A-Rang must have obtained his credit card number from a prior transaction involving the purchase of a rug.

Following receipt of [redacted]'s October 20, 2003, letter, Chase sent the dispute to its fraud investigations department for follow-up. Chase sent [redacted] a letter on November 12, 2003,

stating that the account had been closed and asking him to complete a fraud affidavit. Chase received [redacted]'s completed affidavit, indicating that there were unauthorized charges on his account, on or about December 15, 2005. Despite its statement that the account had been closed, Chase apparently continued to issue account statements for [redacted]'s Chase credit card number 7536 through January 19, 2004, which reflected the $7,000.00 charge. (Respondent's Exhibit 5). Chase issued a new credit card to [redacted] ("account #1980").

Rose Malbon was the Chase fraud investigator handling the dispute. During the December 2003 through February 2004, time frame, Ms. Malbon took little action on the investigation. She appeared to be unclear as to whether she was supposed to be handling the matter or whether the dispute department was supposed to be handling it. She did attempt to contact the merchant and left messages, but never spoke to anyone.

On February 17, 2004, [redacted] told Chase that his credit card was not supposed to be charged until the signal was sent around the world. On February 24, 2003, [redacted] wrote Ms. Malbon, continuing to dispute the validity of the Rang-A-Rang invoice. Nevertheless, on February 27, 2004, Chase rebilled the $7,000.00 to [redacted]'s new Chase credit card.

[redacted] continued to dispute the charge. It was not until April 11, 2004, that Chase gave [redacted] a written explanation of its determination that the charge was valid. The only explanation given by Chase was that "there is participation and services were rendered." (Respondent's Exhibit 15).

On April 22, 2004, Chase obtained a note written by [redacted] in Farsi and given to Rang-A-Rang on July 21, 2003. [redacted] concedes he wrote the note, which appears to authorize Rang-A-Rang to charge $7,000.00 to [redacted]'s Chase account. The parties have stipulated to the English translation of the note, which also states, "The total of the above-mentioned amounts is for broadcasting programs to Iran." Chase faxed the note to [redacted] on April 22, 2004.

In a letter dated April 26, 2004, [redacted] informed Chase that he gave his credit card number to Rang-A-Rang for the purpose of donating $7,000.00 to Rang-A-Rang if Rang-A-Rang broadcast to Iran. At the arbitration hearing, [redacted] testified that the donation was authorized only if Rang-A-Rang broadcast to Iran by February 2004. Rang-A-Rang did broadcast to Iran, but not until some months after February 2004.

Also admitted into evidence at the arbitration hearing by agreement of the parties was an affidavit of Asghar Sorbi, the host of the television show on which [redacted] appeared. Mr. Sorbi testified that when he solicited donations from viewers, he promised that the checks would not be

cashed and credit cards would not be charged until Rang-A-Rang began broadcasting to Iran. Mr. Sorbi stated that when [redacted] gave him the handwritten note authorizing a donation, [redacted] made it clear that his card was not to be charged until and unless Rang-A-Rang began broadcasting to Iran. Sorbi's affidavit also confirms that Rang-A-Rang was not broadcasting to Iran at the time [redacted]'s card was charged. According to Sorbi, the owner of Rang-A-Rang told him they would return the $7,000.00 to [redacted]. Chase did not have this information from Mr. Sorbi prior to the arbitration hearing. Chase's witness, Joette Herrera, testified that, based on Mr. Sorbi's affidavit, Chase would be in a position to re-open the investigation.

Cross Claims for Breach of Contract

[redacted] claims that Chase breached the cardmember agreement by processing a charge he did not authorize and by not properly resolving his dispute in accordance with the terms of the cardmember agreement, which tracks the requirements of the Fair Credit Billing Act. Chase claims that [redacted] used his card to make purchases and/or obtain cash advances and that the balance on his account is past due and owing.

Neither side has cited the arbitrator to a case directly on point with regard to the breach of contract claims. In essence, however, this is a simple breach of contract claim. The elements of a cause of action for breach of contract are: (1) a valid contract; (2) performance by the claimant; (3) the respondents' breach of the contract; and (4) damages. *See McLaughlin, Inc. v. Northstar Drilling Techs.*, 138 S.W.3d 24, 27 (Tex. App –San Antonio 2004, no pet.). The arbitrator must look to the terms of the agreement and determine whether either party failed to comply with a material term.

The cardmember agreement provides, in pertinent part, "You authorize us to pay and charge your Account for all Purchases and Cash Advances **made** or **obtained** by you or anyone you authorize to use your Card or account. You promise to pay us for all of these Purchases and Cash Advances, plus any Finance Charges assessed on your Account and any other charges and fees which you may owe us under the terms of this Agreement. You will be obligated to pay **authorized** charges to your Account whether resulting from. . . ."

The essential question is whether the $7,000.00 Rang-A-Rang charge was authorized by [redacted]. If it was authorized, then [redacted] has breached the contract by failing to pay. However, if the charge was unauthorized, then [redacted] is excused from performing, and Chase has breached the contract by processing an unauthorized charge and failing to delete the charge from

[redacted]'s account after notice of the error. Although the evidence on this point is conflicting, the preponderance of the evidence establishes that the charge was not authorized. [redacted] contacted Chase immediately after receiving his statement to dispute the charge. Although his explanation of the background facts was sketchy at first and somewhat contradictory over time, he always steadfastly contended that the charge was not authorized. The only evidence that the charge was authorized has been sufficiently contradicted. As to the alleged invoice, the evidence that it was bogus is overwhelming. The handwritten note is more problematic. However, the statement in the note that the amount pledged was for broadcast to Iran, coupled with the testimony of [redacted] and Sorbi to the same effect, establishes that broadcast to Iran was a condition precedent to Rang-A-Rang's right to charge the $7,000.00 to [redacted]'s account. The fact that there may have been broadcasts to Iran at a later time is immaterial to the question of whether the charge was authorized when made. Because there was no broadcast to Iran in July of 2003, the condition precedent was not satisfied and therefore the charge was not authorized. Chase's counterclaim for breach of contract fails because the charge was not authorized. Further, Chase's failure to remove the unauthorized charge from [redacted]'s account constitutes a breach of the cardmember agreement.

[redacted] asserts an additional basis for his breach of contract claim based on Chase's failure to properly investigate and respond to [redacted]'s dispute. The cardmember agreement incorporates some of the requirements of the Fair Credit Reporting Act. Specifically, the agreement provides that, when the cardholder notifies the card issuer in writing of a potential error within 60 days of receiving the first bill containing the incorrect charge, the card issuer must acknowledge the letter within 30 days, unless the error has been corrected by then. In addition, the card issuer must either correct the error or explain why it believes the bill was correct, within 90 days of receiving written notification of the error from the cardholder.

Chase contends that [redacted]'s notice was not sufficient because it did not adequately explain why [redacted] believed there was an error. [redacted]'s notice to Chase consisted of the form that Chase sent him to complete. [redacted] completed every section of the form. He clearly identified the charge in question and indicated that he did not request any services from the merchant. [redacted]'s notice was sufficient.

The evidence shows that Chase did acknowledge [redacted]'s dispute within 30 days. However, the evidence also shows that Chase failed to either correct the error or explain in writing to [redacted] why it believes the bill was correct within 90 days of receiving notice of the

dispute. Ms. Herrera testified that this requirement was satisfied because Chase deducted the charge from [redacted]'s account in November 2003. However, documents produced by Chase and admitted into evidence reveal that Chase apparently continued to issue account statements for [redacted]'s Chase credit card number 7536 through January 19, 2004, which reflected the $7,000.00 charge. (Respondent's Exhibit 5). Further, it was not until April 11, 2004, that Chase gave [redacted] a written explanation of its determination that the charge was valid. The only explanation given by Chase was that "there is participation and services were rendered." Clearly, Chase neither corrected the error nor gave [redacted] a written explanation of its determination that the charge was valid within 90 days of receiving [redacted]'s written notice of dispute on September 8, 2003.

Chase complains that [redacted] failed to cooperate and that his changing stories hampered their efforts to investigate his dispute. While [redacted] could have undoubtedly have been more forthcoming, the undersigned arbitrator notes that it took Chase nearly a month (from September 22, 2003 to October 19, 2003) to forward the alleged Rang-A-Rang invoice to [redacted]. As a result, not all of the delay can be laid at [redacted]'s feet. Further, once the cardholder disputes a charge, the burden is on the card issuer to establish that the charge is valid. If it cannot do so within 90 days, then it should credit the account. When Chase failed to either credit the account or provide written notice of the reasons it believed the charge was valid within 90 days, Chase breached the cardmember agreement.

The final element of proof in a breach of contract claim is proof of damages. [redacted] will be allowed to put on proof of his damages at the second phase of this hearing.

[redacted]'s Claim for Violations of § 1666 of the Truth in Lending Act

Pursuant to 15 U.S.C.A. §1666(a)(3)(B)(i) and (ii), Chase had 90 days from its receipt of [redacted]'s notice of dispute within which to either credit the account or provide [redacted] a written explanation of reasons why it believed the charge was correct. As set forth above in the discussion of breach of contract, [redacted] provided a sufficient notice to Chase but Chase failed to either credit the account or provide a written notice of its reason for finding the credit valid within 90 days. In fact, it was not until April 11, 2004, that Chase gave [redacted] a written explanation of its determination that the charge was valid. The only explanation given by Chase was that "there is participation and services were rendered." This explanation was too little, too late. It was not within the 90-day period and did not state a sufficient factual or legal basis for its

determination that the charge was valid. *See,* Dillard Dept. Stores, Inc. v. Owens, 951 S.W. 2d 915 (Tex. App.—Corpus Christi, 1997)(creditor's failure to provide a satisfactory explanation for validity of charge constituted factually and legally sufficient reason for finding a violation of TILA). Chase therefore violated 15 U.S.C.A §1666(a)(3)(B).

Chase contends that, once it referred [redacted]'s dispute to its fraud investigation department, the claim no longer constituted a "billing error" and therefore Chase was no longer obligated to comply with the time requirements of 15 U.S.C.A §(a)(3)(B). However, the Official Staff Commentary to Regulation Z §12(c), states that "[a]n assertion that a particular transaction resulted from an unauthorized use of the card could also be both a 'defense' and a billing error." Indeed, Chase's own fraud investigator, Ms. Malbon, seemed unsure that the dispute should have been treated as a fraud investigation and tried to send it back to the billing dispute department. Thus, just because Chase decided to investigate this unauthorized use as a fraud claim does not mean it was relieved of its responsibilities to timely complete the billing error investigation.

Chase further argues that, if it violated any TILA provisions, the violations were unintentional, bona fide errors for which it should not be held liable pursuant to 15 U.S.C.A. §1640(c). As Chase gives no rationale for this argument, the undersigned finds this position unpersuasive. This is especially true since the T.I.L.A. is to be enforced strictly against creditors and construed liberally in favor of the consumer. *See,* Thomas v. Myers-Dickson Furniture Co., 479 F.2d 740, 748 (5th Cir. 1973).

Pursuant to 15 U.S.C.A. §1640(a) and 15 U.S.C. §1666(e), the penalties for failing to respond timely are (1) $50.00 forfeiture per 15 U.S.C. §1666(e); and (2) damages under 15 U.S.C. §1640(a) which can include actual damages to the extent the failure to timely respond caused Plaintiff's damages; statutory damages twice the amount of any finance charge in connections with the transaction, which shall not be less that $100.00 nor greater than $1,000.00; and attorney's fees as determined by the court. *See,* Koons Buick Pontiac GMC, Inc. v. Nigh, 125 S. Ct. 460, 543 U.S. 50 (2004)(holding that the provision of TILA setting minimum and maximum amounts for statutory damage awards "under this subparagraph" applies generally to awards made under either of the first two clauses of that subparagraph). Thus, the most an individual claimant can recover under 15 U.S.C.A. §1640(a)(i) and (ii) is $1,000.00.

At the damages phase of the hearing, [redacted] may present evidence of any actual damages caused by the failure to timely respond as well as his attorney's fees. The arbitrator notes that Chase has stated several times that [redacted] has failed to disclose any actual damages in response

to appropriate discovery requests. This is an objection that Chase can urge at the time any such evidence is offered. The court will not be inclined to admit any such evidence not previously disclosed absent extraordinary circumstances justifying such admission.

[redacted]'s Claims for Violations of the Fair Credit Reporting Act and its Texas law counterparts

In his second amended petition, [redacted] claimed that Chase violated the Fair Credit Reporting Act (15 U.S.C. §§ 1681 *et seq.*) by representing to credit reporting agencies that [redacted]'s credit report was being obtained for a permissible purpose when it was not and by reporting to the credit reporting agencies that [redacted] willfully and without cause stated refused to pay amounts due to Chase. In his post-hearing brief, [redacted] also specifically alleged a violation of 15 U.S.C. §1681 S-2(b) for the first time. Specifically, [redacted] claims that Chase failed to conduct a reasonable investigation after receiving notice from the credit reporting agencies that [redacted] disputed the validity of Chase's statement of facts.

The alleged violation of 15 U.S.C. §1681s-2(b) was never plead by [redacted] prior to the arbitration hearing, either by reference to the specific statutory provision or by setting forth facts establishing such a claim. Thus, this claim is barred. Even had [redacted] properly plead such a claim, he produced no evidence at the arbitration hearing regarding what, if any, investigation Chase undertook, and what, if anything, Chase reported to the consumer reporting agencies. Therefore, [redacted] failed to prove a claim under 15 U.S.C. §1681s-2(b).

As for [redacted]'s remaining claims under 15 U.S.C., he concedes there is no private right of action under 15 U.S.C. §1681s-2(a). In addition, the evidence at arbitration established that Chase did have a permissible purpose for pulling [redacted]'s credit report. Therefore, [redacted]'s Fair Credit Reporting Act claims fail in their entirety.

[redacted]'s claim for violations of the Texas Debt Collection Act is without merit. [redacted] conceded at the arbitration that the Texas Debt Collection Act was not violated. In addition, any claims [redacted] asserts in this regard regarding Chase's right to pull his credit report would be pre-empted by FCRA. Further, the only evidence [redacted] offered of an alleged violation of the Texas Finance Code was that Chase representatives continued to call [redacted] directly after receiving notice that he was represented by an attorney. However, [redacted] points to no specific provision of the Texas Finance Code prohibiting such actions, and the undersigned can find none. Therefore, [redacted] has failed to establish a claim under either the Texas Debt Collection Act or the Texas Finance Code.

[redacted]'s Remaining State Law Claims

[redacted]'s remaining state law claims include intentional misrepresentation, negligence, gross negligence, negligent misrepresentation, defamation, and tortious interference with contract. All of these claims arise out of Chases alleged inaccurate reporting to the credit reporting agencies which is governed by 15 U.S.C. §1681s-2(a). As a result, these claims are all pre-empted by the federal statute. *See Washington v. CSC Credit Services,* 199 F.3d 263, 269, fn. 5 (5th Cir. 2000), *Young v. Equifax,* 294 f.3d 631, 639 (5th Cir. 2002). Even if these claims are not pre-empted by federal law, the undersigned finds that [redacted] did not present evidence sufficient to establish any of these causes of action.

[redacted]'s claim for declaratory and injunctive relief

These claims were not addressed in the post-hearing briefing. The undersigned finds that [redacted] has not established his entitlement to either declaratory or injunctive relief in this arbitration.

Phase 2 of the Arbitration Hearing

The arbitration hearing shall be continued to consider [redacted]'s claim for damages as a result of Chase's breach of contract and violations of TILA as set forth herein. Within 5 business days of the parties' receipt of this interim award, the parties shall furnish to JAMS case manager Elizabeth Gravitt the following:

1. an estimate of the time needed for the damages phase of the hearing
2. all dates on which the parties are **unavailable** in the 30 days following receipt of this interim award.

Upon receipt of the foregoing information, the parties will be contacted by JAMS with respect to scheduling the second phase of the hearing.

Karen B. Wellington
Arbitrator

2/3/06
Date

PROOF OF SERVICE BY FACSIMILE and MAIL

I, Elizabeth Gravitt, am over the age of 18 and not a party to the within action, hereby declare that on February 09, 2006, I served the attached Interim Award on Liability Phase of Arbitration Hearing on the parties in the within action by facsimile and depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Dallas, Texas, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at Dallas, Texas on February 09, 2006.

Elizabeth Gravitt

JAMS

THE RESOLUTION EXPERTS

February 9, 2006

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VIA FACSIMILE & U.S. MAIL

Re: [redacted] **vs. Chase Bank USA, N.A.**
JAMS Ref. No.: 1310015374

Dear Counsel:

Enclosed please find the Interim Award on Liability Phase of Arbitration Hearing executed by Hon. Karen Willcutts (Former).

Kindest Regards,

Elizabeth Lee Gravitt
Case Manager
EGravitt@jamsadr.com

Enclosure