IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

TERRY BRUESEWITZ,

Plaintiff,

v.

MEMORANDUM AND ORDER
05-C-542-S

WOLPOFF & ABRAMSON, LLP,
RONALD M. ABRAMSON, KELLY MACBETH,
RONALD CANTER, NEAL LEVITSKY and
MBNA AMERICAN BANK, N.A.,

Defendants.

Plaintiff Terry Bruesewitz commenced this action against his lender, MBNA American Bank, N.A. and its collection attorneys, Wolpoff & Abramson, L.L.P., in the Circuit Court for Jefferson County Wisconsin alleging violations of the Fair Debt Collection Practices Act (FDCPA) and the Wisconsin Consumer Act, and seeks to enjoin a pending arbitration proceeding between the parties. Defendants removed the matter to this Court pursuant to 28 U.S.C. §§ 1441(b) and 1331 based on the FDCPA claim, which is presently before the Court on defendants' motion to compel arbitration. The following facts are undisputed for purposes of the pending motion.

FACTS

In August 1996 plaintiff and defendant MBNA entered into a consumer credit agreement governed by an Account Agreement which prescribed the terms of the credit relationship.

The 1996 agreement included the following:

> **Amendments:** We may amend this Agreement by complying with the applicable notification requirements of federal law and the laws of the State of Delaware, as amended. Under current law, if we amend the Agreement to either increase the **FINANCE CHARGE** on any balance or increase any other charge which is considered interest under Delaware law, we may require you to pay the higher **ANNUAL PERCENTAGE RATE** or other higher interest charges unless: 1) you write to us at the address stated on the notice and reject the amendment, and 2) your account is not used after a date specified in our notice. The amended Agreement (including the higher rate or other higher charges) will apply to the entire unpaid balance, including the balance existing before the amendment became effective.

On or about December 20, 1999 MBNA mailed plaintiff a written notification that it was amending the 1996 agreement in accordance with the above provision. The notice was mailed to N5357 Highway 89, Lake Mills, WI 53511. The notice provided in part:

> This Amendment changes the terms of your Credit Card Agreement. Please read this document carefully and keep it with your Credit Card Agreement. Except for this Amendment, the terms of your Credit Card Agreement continue in full force and effect.
>
> As provided in your Credit Card Agreement and under Delaware law, we are amending the Credit Card Agreement to include an Arbitration Section. Please read it carefully because it will affect your right to go to court, including any right you may have to have a jury trial. Instead, you (and we) will have to arbitrate claims. You may choose not to be subject to this Arbitration Section by following the instructions at the end of this notice; you may continue to use your account under the existing terms even if you reject this section. This Arbitration Section will become effective on February 1, 2000. The Arbitration Section reads:

> Arbitration: Any claim or dispute ("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 any prior Agreement or your account (whether under a statute, in contract, tort, or otherwise and whether for money damages, penalties or declaratory or equitable relief), including Claims regarding the applicability of this Arbitration Section or the validity of the entire Agreement or any prior Agreement, shall be resolved by binding arbitration.
>
> * * * *
>
> *If you do not wish your account to be subject to this Arbitration Section, you must write to us at MBNA America, P.O. Box 15565, Wilmington, DE 19850. Clearly print or type your name and credit card account number and state that you reject this Arbitration Section. You must give notice in writing; it is not sufficient to telephone us. Send this notice only to the address in this paragraph; do not send it with a payment. We must receive your letter at the above address by January 25, 2000 or your rejection of the Arbitration Section will not be effective; you may continue to use your account under the existing terms even if you reject this section.*

Defendant MBNA did not receive a response from plaintiff nor was the notice returned to it as undeliverable.

From February 2000 to January 2001 plaintiff continued to use his account increasing his outstanding debt from $15,000 to $43,000 dollars.

Beginning in 2001 plaintiff's account was treated as a "Goldoption" account and may have become governed by a new Goldoption account agreement. The Goldoption account agreement includes an arbitration agreement which is in relevant respects

identical to the arbitration agreement in the 1999 notice. It also includes the following provision which immediately precedes the arbitration provision:

> **Litigation**: The Arbitration provisions below apply to you unless you were given the opportunity to reject the Arbitration provisions and you did so reject them; in which case you agree that any litigation brought by you against us regarding this account or this Agreement shall be brought in a court located in the State of Delaware.

In September 2004 Defendant MBNA commenced an arbitration proceeding alleging that plaintiff had defaulted on the credit agreement. Plaintiff responded to the arbitration claim and participated in the proceedings to include seeking discovery from defendant MBNA on May 31, 2005. Concerned with his inability to obtain discovery in the arbitration proceeding plaintiff commenced this action.

MEMORANDUM

Defendant argues that the parties agreed to submit the matters in dispute to arbitration and alternatively, that plaintiff's participation in arbitration precludes his challenge to the agreement to arbitrate. Plaintiff contends that factual issues remain as to the existence of the agreement to arbitrate and as to whether any agreement is unconscionable and unenforceable.

Whether the parties entered an enforceable agreement to arbitrate is a matter of contract law for the Court to resolve and

a prerequisite to compelling arbitration. Matthews v.Rollins Hudig Hall Co., 72 F.3d 50, 53 (7th Cir. 1995). However, a request to refer a matter to arbitration is generally favored by federal law.

> Congress's enactment of the Federal Arbitration Act ("FAA") created national substantive law controlling all issues concerning the validity and enforceability of covered arbitration agreements and reflected a strong federal policy favoring arbitration as a means of dispute resolution. Under the terms of the FAA, district courts have no discretion to refuse a request for stay and shall direct the parties to proceed to arbitration on issues covered by an arbitration agreement. The Supreme Court has said that when interpreting an arbitration clause, district courts must refer disputes to an arbitrator "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute."

Morrie Mages and Shirlee Mages Foundation v. Thrify Corp., 916 F.2d 402, 406 (7th Cir. 1990)(citations omitted)(quoting United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)). "Questions of arbitrability must be addressed with a healthy regard for this policy." Wisconsin Auto Title Loans, Inc. v. Jones, 2005 WI App 86, ¶8, 280 Wis. 2d 823, 696 N.W.2d 214.

Agreement to Arbitrate

The initial question is whether there is genuine factual dispute concerning the existence of an agreement to arbitrate. There is no dispute that the credit relationship between the

parties began in 1996, a date noted on each billing statement sent by defendant MBNA to plaintiff. MBNA's records custodian has provided an agreement dated June 1996, which governed the parties' relationship in 1996. Plaintiff offers no evidence which would contradict the conclusion that this agreement governed at the outset of the relationship. The agreement contains no arbitration provision but does include provisions permitting amendment by MBNA.

MBNA's records also reflect that it mailed an amendment properly addressed to plaintiff on December 20, 1999 ("1999 amendment") which proposed to add an arbitration provision to the agreement. That proposal permitted plaintiff to reject the arbitration amendment by notifying defendant MBNA in writing. MBNA's records show neither a rejection nor a return of the proposed amendment. The only reasonable inference is that the offer was received and not rejected by plaintiff. See Tinder v. Pinkerton Security, 305 F.3d 728, 735-36 (7th Cir. 2002). Plaintiff offers no evidence to rebut the inference. Specifically he does not deny receiving the 1999 amendment, does not deny that he failed to reject it and does not deny that under the existing 1996 agreement it would have become effective under these circumstances. To avoid arbitration the party opposing it must identify a triable issue of fact concerning the existence of the agreement. Id. Plaintiff has failed to present sufficient evidence

to rebut the conclusion that the parties agreed to the 1999 amendment which added the agreement to arbitrate. Furthermore, none of plaintiff's proposed additional discovery suggests the potential to refute the facts which compel this conclusion.

Plaintiff seeks to create a genuine issue of fact from the defendant's offer of a separate 2001 credit agreement ("Goldoption agreement) in the previous arbitration proceeding. Specifically, plaintiff suggests that by producing the Goldoption agreement in arbitration defendants conceded that it was the first agreement entered by the parties. The position in entirely untenable. The agreement itself is dated 2001 which coincides with the designation of plaintiff's account as a Goldoption account. If the Goldoption account governs the parties' relationship it is because it amended or supplanted the earlier agreements. Defendants' submission of the Goldoption agreement in arbitration is entirely consistent with it being the most recent, rather than the original agreement between the parties. Since the substance of the arbitration agreement is identical to the 1999 amendment which had previously become a part of the parties' agreement, the Goldoption agreement has no effect on the existence of an agreement to arbitrate.

Finally, plaintiff's significant participation in the arbitration proceedings confirms the inescapable conclusion the parties had agreed to arbitrate. Indeed, plaintiff's attempted

abandonment of the arbitration process appears to be a reaction to his belief that arbitration was going badly for him, not to any newly discovered evidence that the parties did not agree to arbitrate.

Unconscionability

The second issue before the court is whether the arbitration agreement should be deemed unconscionable and therefore unenforceable. The Arbitration Act expressly contemplates that arbitration agreements may be deemed void on the same basis as other contracts. 9 U.S.C. § 2. Under Wisconsin law a contract is unenforceable only if it is both procedurally and substantively unconscionable. Wisconsin Auto Title 280 Wis. 2d at ¶ 13 Procedural concerns generally address whether the weaker party had a meaningful opportunity to consider and a choice to enter the agreement. Id. Substantive unconscionability considers whether the terms themselves are commercially reasonable. Id.

The 1999 arbitration agreement is not unconscionable either procedurally or substantively. Procedurally the agreement was separately presented, plainly written and prominently informs the account holder that he or she can reject the proposed amendment and maintain the existing agreement. There was no contractual penalty to rejecting the proposal and plaintiff had a full month to reject it. Trappings of procedural unconscionability such as a take it or

leave it presentation or confusing or unexplained terms, see id. at ¶ 16, are entirely absent in the 1999 amendment. Because the arbitration clause of the Goldoption agreement is identical and is inapplicable if the account holder had rejected the 1999 amendment, the procedural unconscionablity analysis is identical for it.

Substantively, the agreement is entirely reasonable in that it treats the parties equally. Unlike the stricken provision in Wisconsin Auto Title, the agreement does not favor defendants and does not require litigation in two separate forums. It presents a balanced playing field which was absent in Wisconsin Auto Title. This action has proceeded in a separate forum only because of plaintiff's effort to avoid the arbitration agreement.

Plaintiff's argument in favor of a finding of unconsionability and the need for further discovery focuses primarily on defendant's allegedly improper conduct in arbitration and on contract provisions other than the arbitration clause. However, an unconsionability analysis is properly determined as of the time the agreement was made and is limited to consideration of the arbitration agreement. Id. at ¶ 13-14. The arbitration agreement itself expressly delegates the issue of the validity of the other agreement terms to the arbitrator. Any dispute over these facts is immaterial to the motion to compel arbitration.

CONCLUSION

Plaintiff and Defendant MBNA entered into a binding agreement to arbitrate the disputes presented in this action, which agreement was neither procedurally nor substantively unconscionable. Accordingly, the court is bound to return the matter to arbitration.

ORDER

IT IS ORDERED that Plaintiff's motion to stay a ruling on defendant's motion to compel arbitration is DENIED.

IT IS FURTHER ORDERED that defendants' motion to compel arbitration is GRANTED.

IT IS FURTHER ORDERED that this matter is dismissed without prejudice, subject to an immediate reopening and placed at the head of this Court's calendar at any party's request in the event all issues are not finally resolved in arbitration.

Entered this 8th day of November, 2005.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge