

NOT TO BE PUBLISHED WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

JEFFERY A. WINTERS and
COLLECTION SOLUTIONS, INC.,

Plaintiff(s),

vs.

ELECTRONIC MERCHANT SYSTEMS,
BMO HARRIS BANK, NA,
CHESAPEAKE BANK, THE MERRICK
BANK CORPORATION, DEMETRI
PAPAFAGOS, and INDIGO SYSTEMS
NJ, LLC,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

BERGEN COUNTY

DOCKET NO. BER-L-7152-16

CIVIL ACTION

OPINION

Decided: October 27, 2017

Honorable Robert C. Wilson, J.S.C.

FACTUAL BACKGROUND

This matter comes before the Court by way of a motion to compel arbitration and stay proceedings filed by Christopher Loeber, Esq. on behalf of Defendants Electronic Merchant Systems, BMO Harris Bank, Chesapeake Bank, and the Merrick Bank Corporation. An opposing cross motion was filed by David M. Hoffman, Esq. on behalf of Plaintiffs Jeffery Winters and Collection Solutions additionally seeking leave to file a second Amended Class Action Complaint.

The instant case arose from a conflict relating to a contract executed by Defendants Electronic Merchant Systems (“EMS”), Chesapeake Bank (“Chesapeake”) and Plaintiff Collective Solutions Inc. (“CSI”) in January of 2014. That contract (the “Merchant Agreement”) contains an arbitration clause which purportedly states that disputes relating to the Merchant Agreement must

be arbitrated. An EMS sales agent, S&A Global Inc. d/b/a NetPay (“NetPay”) worked to memorialize the agreement between the parties, and enroll CSI in EMS services. NetPay utilized a form agreement from EMS’s secure portal in order for the Merchant Agreement. Jeffery Winters signed the Merchant Agreement on CSI’s behalf and as their personal guarantor.

Following the execution of the Merchant Agreement, EMS processed payments for CSI. CSI made requests to increase its processing limit under the agreement throughout 2014 and 2015, and in May of 2016 EMS increased CSI’s monthly processing limit to \$250,000.00. Subsequently, the number of chargebacks, which are disputed transactions by cardholders, increased on the CSI account. The Merchant Agreement set a chargeback ratio limit of 0.5%. When the ratio exceeded this limit, EMS had the unilateral right to terminate the agreement. EMS exercised this right on May 17, 2016.

The Defendants now argue that that this dispute should be resolved through arbitration, pursuant to the Merchant Agreement. They seek to compel such arbitration and to stay the proceedings in this Court. The Plaintiffs oppose the Defendants’ motion on the grounds that the arbitration provision is invalid, too limited in scope, and inherently defective for lacking an impartial process.

RULE OF LAW AND DECISION

1. The Arbitration Clause in the Merchant Agreement is Invalid because it is Indecipherable.

An enforceable bilateral agreement requires an offer, an acceptance, consideration and a meeting of the minds upon all the essential terms of the agreement. Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992). The terms “must be sufficiently definite that performance to be rendered by each party can be ascertained with reasonable certainty.” *Id.* at 435 (holding that buyer and

broker did not enter into an enforceable agreement because they had not agreed on essential terms). Therefore, “where the parties do not agree to one or more essential terms ... courts generally hold that the agreement is unenforceable.” *Id.* (citing Heim v. Shore, 56 N.J. Super. 62, 72-73 (App. Div. 1959)).

Generally, New Jersey Courts have encouraged the arbitration of disputes when contractual agreements provide for such resolution. See NAACP of Camden Cty. East v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div. 2011) (quoting N.J.S.A. 2A:23B-6 that an agreement to arbitrate is “valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract”). The Appellate Division has explained that an agreement to arbitrate must be “the product of mutual assent, as determined under customary principles of contract law.” NAACP of Camden Cty. East, 421 N.J. Super. 404, 424 (App. Div. 2011). Courts have determined that “the clarity and internal consistency of a contract's arbitration provisions are important factors in determining whether a party reasonably understood those provisions and agreed to be bound by them.” *Id.* at 425. Finally, this Court notes that the standard articulated in the Atalese v. U.S. Legal Services Group dealt specifically with a consumer agreement. While agreements between merchants may be allowed more leeway in their formulation or presentation, the outside bounds of what constitutes a valid arbitration agreement is still informed by the aforementioned contract principles.

Here, there is no enforceable arbitration clause in the Merchant Agreement. As explained above, agreements to arbitrate must meet the basic requirements of contract formation. The executed copy of the arbitration clause submitted by the proponent of the arbitration clause (Defendants’ ex. A), which the Court attached to this opinion, is illegible. The print is small, dense, and indecipherable. A provision of a contract with these defects could not be said to have been a product of mutual assent, much less have the clarity and internal consistency which Courts

look to in order to enforce arbitration agreements. Here, the proponent of the arbitration clause has failed to show that the clause was a product of mutual assent. Thus, this Court cannot find that the arbitration clause meets the requisite standard for enforceable contracts. As a result, the arbitration clause is unenforceable and the motion must be denied.

For the foregoing reasons, the Defendant's Motion to compel arbitration and compel the proceedings is **DENIED**.

It is so ordered.

Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement.

1. **Definitions.** The terms used in this Agreement shall have the meanings set forth in the definitions section hereof. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement.

2. **Term and Termination.** This Agreement shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement.

3. **Assignment.** Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement.

4. **Entire Agreement.** This Agreement shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement.

5. **Force Majeure.** Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement.

6. **Notwithstanding to whomsoever.** Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement.

7. **Assignment.** Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement.

8. **Notwithstanding to whomsoever.** Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement.

9. **Assignment.** Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement.

10. **Notwithstanding to whomsoever.** Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement.

11. **Assignment.** Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement.

12. **Notwithstanding to whomsoever.** Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement. Bank and EMS shall remain in full force and effect until the date of termination of this Agreement.

Collections Solutions Inc.
Print Merchant Name
Jeffrey A. Winters

ELECTRONIC MERCHANT SYSTEMS

Print Office Name
1-3-2014

Signed By
Date

Signed By
Date