IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DWAINE PERRY, BENITA PERRY, and CANDICE K. BAIER on behalf of themselves and all others similarly situated,	:	
Plaintiffs,	:	**CIVIL ACTION**
v.	:	
FLEETBOSTON FINANCIAL CORP., d/b/a FLEET CREDIT CARD SERVICES,	:	
Defendant.	:	**No. 04-507**

MEMORANDUM AND ORDER

Schiller, J. **July 6, 2004**

Plaintiffs Dwaine and Benita Perry and Candice K. Baier bring this class action against Defendant FleetBoston Financial Corporation, d/b/a Fleet Credit Card Services ("Fleet") seeking damages for alleged violations of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681v (2004) ("FCRA"). Presently before the Court is Defendant's motion to compel arbitration and stay proceedings pending completion of arbitration, pursuant to an arbitration provision contained in Plaintiffs' amended cardholder agreements. For the reasons set out below, Defendant's motion is denied.

I. BACKGROUND

Plaintiffs Dwaine and Benita Perry opened a Fleet credit card account in January 1998. (B. Perry Aff. ¶ 2; D. Perry Aff. ¶ 2.) Plaintiff Candace K. Baier opened her Fleet credit card account in August 2000. (Baier Aff. ¶ 5.) Each of the Plaintiffs signed a contract with Fleet entitled "Cardholder Agreement," which contained over thirty provisions detailing the terms of their

relationship. (McClarren Decl., Ex. A, B (Cardholder Agreements).) One such provision purportedly gave Defendant the ability to make unilateral changes to the Agreement:

> **Change in Terms** We have the right to change any of the terms of this Agreement, including but not limited to rates and fees, at any time. You will be given notice of a change as required by applicable law. Any change in terms governs your Account as of the effective date and will, as permitted by law and at our option, apply both to transactions made on or after such date and to any outstanding Account balance.

(McClarren Decl., Ex. A ¶ 24; Ex. B ¶ 24.) None of the thirty provisions in the contract addressed the resolution of future disputes between the cardholder and the bank. (McClarren Decl., Ex. A.) In April 2000, Fleet cancelled the Perrys' credit privileges due to non-payment, at which time the outstanding balance on their account was over $11,000.00. (Supplemental McClarren Decl. ¶ 8.) Although Ms. Baier's account was never officially closed, she "stopped using" her card in January 2001 because of the "huge balance." (Baier Aff. ¶ 7.) The Perrys and Baier continued to receive monthly statements indicating their outstanding balances, and each made occasional payments. (Supplemental McClarren Decl. ¶ 10.)

In February 2001, Fleet mailed an "Important Legal Notice" to its cardholders that explained a new "Arbitration Provision" that Fleet sought to add to the Cardholder Agreement. (McClarren Decl. ¶¶ 6-12.) All cardholders who received the mailed notice of the Arbitration Provision were given the ability to opt-out of the agreement by sending a timely rejection letter to Fleet. (*Id*. ¶¶ 8-9.) Cardholders who exercised their right to opt-out were informed that their "rights and duties under the agreement [would] remain effective without the Arbitration provision." (*Id*. ¶ 8.) Plaintiffs do not recall receiving or reading this notice, and therefore they did not avail themselves of the opt-out clause. (B. Perry Aff. ¶ 5; D. Perry Aff. ¶ 5; Baier Aff. ¶ 9.) According to the notice,

cardholders who did not opt-out would become bound by the Arbitration Provision on its effective date, thirty-five days after the close of Plaintiffs' respective billing cycles. (McClarren Decl. ¶ 8.)

Plaintiffs Dwaine and Benita Perry assert that during 2001 and 2002, Fleet accessed their Trans Union credit reports several times for the purposes of "an account review or other business transaction." (D. Perry Aff., Ex. A (Credit Report); B. Perry Aff., Ex. B (Credit Report).) Baier asserts that Fleet also accessed her account for the same purposes, several times in 2001 and once in 2002. (Baier Aff., Ex. F (Credit Report).) Plaintiffs allegedly became aware that Defendant had accessed their credit reports when the Perrys and Baier received copies of their Trans Union credit reports in November and April 2002, respectively. (Compl. ¶ 15.) Plaintiffs filed a class action lawsuit in this Court on February 4, 2004, asserting that Defendant, under "false pretenses" and therefore in violation of the FCRA, reviewed Plaintiffs' credit reports after Plaintiffs no longer had a relationship with the Defendant. (Compl. ¶¶ 15-21.) Defendant now moves to compel arbitration under the terms of the February 2001 Arbitration Provision.

II. STANDARD OF REVIEW

Although the Federal Arbitration Act ("FAA")[1] establishes "a strong federal policy in favor of the resolution of disputes through arbitration," *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (*citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)), a court will not compel a reluctant party to arbitrate without first determining whether the

[1]The FAA provides that "a written provision in any . . . contract involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2004).

parties entered a valid agreement to arbitrate. *Perilla v. IAP Worldwide Servs.*, 368 F.3d 269, 275-76 (3d Cir. 2004); *see* 9 U.S.C. § 2 (2004). A federal court must look to the relevant state law on the formation of contracts to determine whether there is a valid arbitration agreement. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Alexander*, 341 F.3d at 264. As the instant contract contains a Rhode Island choice-of-law provision, this Court will look to Rhode Island law to determine if the parties entered a valid agreement to arbitrate.[2] *Springfield Oil Servs., Inc. v. Costello*, 941 F. Supp. 45, 47 (E.D. Pa 1996) ("Pennsylvania courts generally honor the intent of the contracting parties and enforce choice of law provisions in contracts executed by them.") (internal citations omitted); *A.T. Cross Co.* v. *Royal Selangor PTE, Ltd.*, 217 F. Supp. 2d 229, 235 (D.R.I. 2002) (applying Rhode Island law to determine validity of arbitration agreement due to choice of law provision).

III. DISCUSSION

Defendant argues that Plaintiffs are bound by the valid agreements to arbitrate that were purportedly incorporated into their Cardholder Agreements pursuant to the "Change in Terms" provision of Plaintiffs' contracts. In response, Plaintiffs argue that the addition of the arbitration provision exceeded Defendant's authority under the Change in Terms provision because no mention of dispute resolution – either in an arbitral or judicial forum – existed in their original Cardholder Agreements. Therefore, according to Plaintiffs, they did not reasonably expect that Fleet could use

[2]The parties do not dispute that the original Cardholder Agreement is an enforceable contract with a Rhode Island choice-of-law provision. Accordingly, Rhode Island law governs this Court's analysis of Defendant's attempt to amend the Cardholder Agreement through its Change in Terms authority.

its Change in Terms authority to add wholly new clauses regarding uncontemplated subject-matter to the contract.

Rhode Island courts have not directly addressed whether an arbitration clause may be unilaterally added to a cardholder agreement through Change in Terms authority when the initial agreement does not contain terms regarding dispute resolution. Although Rhode Island has not addressed this issue, other courts have reached conflicting conclusions. Many of these decisions turn on whether a particular state legislature has explicitly authorized such conduct. Courts applying a state law that explicitly authorizes this practice have upheld it, while courts that are not similarly bound have often struck down attempts to add wholly new provisions to cardholder agreements. *Compare Discover Bank v. Shea*, 827 A.2d 358, 362 (N.J. Super. Ct. Law Div. 2001) ("Discover's unilateral attempt to amend its original cardholder agreement to include an arbitration clause is ineffective."); *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 289 (Cal. Dist. Ct. App. 1998) ("[T]he parties did not intend that the change of terms provision should allow the Bank to add completely new terms such as an ADR clause simply by sending out a notice."), *with Fields v. Howe*, No. 01-1036, 2002 WL 418011, at *5, 2002 U.S. Dist. LEXIS 4515, at *12 (S.D. Ind. Mar. 14, 2002) (finding unilateral addition of arbitration agreement specifically authorized by Delaware statute); *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 831 (S.D. Miss. 2001) (finding unilateral addition of arbitration clause specifically authorized by Ohio statute); *but see Beneficial Nat'l Bank, U.S. v. Payton*, 214 F. Supp. 2d 679 (S.D. Miss. 2001); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886 (Ill. App. Ct. 2003). In the instant case, at the time of all relevant events, the Rhode Island legislature had not explicitly authorized unilateral additions of new terms through one party's

change-in-terms authority.[3]

As Rhode Island has not directly addressed this issue, this Court will look to general contract law in Rhode Island to determine if a Rhode Island court would allow the unilateral addition of an arbitration clause through the Change in Terms provision of the Cardholder Agreements at issue. *See Defontes v. Dell Computers Corp*., No. 03-2636, 2004 WL 253560, at *5, 2004 R.I. Super. LEXIS 32, at *14 (Jan. 29, 2004) ("Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."(internal quotations and citations omitted)). In Rhode Island, contract language is assigned its ordinary, dictionary meaning. *Dudzik v. Leesona Corp*., 473 A.2d 762, 765 (R.I. 1984). If the terms are clear and unambiguous, they will be applied as written. *W.P. Assocs. v. Forcier, Inc*., 637 A.2d 353, 356 (R.I. 1994). However, if a contract term is "reasonably and clearly susceptible of more than one interpretation," it is ambiguous and a court must determine its meaning. *Rivera* v. *Gagnon*, 847 A.2d 280, 284 (R.I. 2004) (*citing Rubery* v. *Downing Corp*., 760 A.2d 945, 947 (R.I. 2000)). Furthermore, in cases involving standardized contracts where the drafter has the stronger bargaining position, Rhode Island courts construe ambiguous terms against the drafter. *Allstate Drilling Co. v. Martinelli*, No. 02-5877, 2004 WL 253526, at *2, 2004 R.I. Super. LEXIS 27, at *5 (R.I. Super. Ct. Jan. 15, 2004) (*citing Judd Realty, Inc. v. Tedesco*, 400 A.2d 952, 955 (R.I. 1979)); *Bush v. Nationwide Mut. Ins. Co.*, 448 A.2d 782, 784 (R.I. 1982) ("[I]f the language employed in the [insurance] policy is

[3]The Court notes that Rhode Island did enact such a statute in 2004. R.I. GEN. LAWS § 6-26.1-11(a) (2004). Neither party brought this statute to the Court's attention nor argued that it is relevant to the disposition of this case, though it would have had little bearing because all the events of the instant case took place prior to 2004. *See Direct Action for Rights and Equal. v. Gannon*, 819 A.2d 651, 658 (R.I. 2003) ("[A court] presumes that statutes and their amendments operate prospectively unless there is clear, strong language or a necessary implication that the General Assembly intended to give the statute retroactive effect.").

ambiguous or susceptible of one or more reasonable interpretations, it will be construed in favor of the insured."(internal citation omitted)); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a (1981) (noting that terms will be construed against the drafter "in cases of standardized contracts and in cases where the drafting party has the stronger bargaining position.").

Turning to the contract at issue, the Change in Terms provision in the Cardholder Agreement is ambiguous because it is reasonably susceptible of more than one interpretation. *See W.P. Assocs.*, 637 A.2d at 356. This provision could reasonably be construed to allow Defendant either (1) to modify only those terms already contained or contemplated in the original Agreement, or (2) to both modify *and* insert additional, previously uncontemplated, terms to the original agreement. *See Badie*, 79 Cal. Rptr. 2d at 287 (finding similar provision ambiguous). As Fleet possessed the stronger bargaining position and drafted this standardized agreement, this Court must construe the ambiguous contract language against the drafter. Accordingly, this Court finds that the unilateral Change in Terms authority applies only to those terms already contained or contemplated in the original agreement.[4]

The original Cardholder Agreements drafted by Fleet are detailed contracts, containing over thirty carefully-worded clauses. Despite the contracts' comprehensive description of the relationship between these parties, Fleet did not include any mention of arbitration or any other forum for dispute resolution. Accordingly, nothing in these terms would alert a consumer to the fact that Fleet might later impose a term abrogating their rights to pursue disputes in a civil forum, especially when Plaintiffs were no longer using their cards. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211

[4]As discussed below, if Plaintiffs had manifested their assent by using their credit card after the agreement was mailed, it would no longer be a unilateral amendment by Fleet.

cmt. f (1981) ("[C]ustomers are not bound to unknown terms which are beyond the range of reasonable expectation."). Therefore, Fleet lacks the authority under the Change in Terms provision to make previously uncontemplated, unilateral changes to the Cardholder Agreement.

The Court is cognizant that change in terms procedures are necessary "due to the ever-changing economic conditions, the fast-moving and highly competitive credit card marketplace, and the fact that open-end or revolving credit card agreements are generally indefinite in duration." (Def.'s Reply Mem. in Supp. of Mot. to Compel Arbitration at 7 n.3). However, although Plaintiffs agreed to the Change in Terms provision, Defendant's authority is not unbridled. *Allstate Drilling Co.*, 2004 WL 253526, at *3 (*citing Fondedile, S.A. v. C.E. Maguire, Inc.*, 610 A.2d 87, 92 (R.I. 1992) (distinguishing between Defendant's "ability to make small modifications in order to . . . accommodate the unexpected" and an attempt to make "drastic changes" which go "beyond the scope of the provision providing for changes.")). The Change in Terms provision is reasonably limited to terms previously contemplated by the original agreement, so long as cardholders do not accept the unilateral change by continuing to use their cards. Otherwise, credit card holders would find themselves in an Orwellian nightmare, trapped in agreements that can be amended unilaterally in ways they never envisioned.[5]

This conclusion is especially appropriate given the disparity in the parties' bargaining power. *Badie*, 79 Cal. Rptr. 2d at 284 ("Where a party has the unilateral right to change the terms of a contract, it does not act in an objectively reasonable manner when it attempts to recapture a forgone

[5] The Court is reminded of George Orwell's 1946 work, Animal Farm, in which the pigs assume power and change the terms of the animals' social contract, reducing the original Seven Commandments, which included "All animals are equal," to one – "All animals are equal, but some animals are more equal than others."

opportunity by adding an entirely new term which has no bearing on any subject . . . addressed in the original contract and which was not within the reasonable contemplation of the parties when the contract was entered into."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (1981). Thus, this Court construes Defendant's unilateral change in terms authority to extend only to the modification or alteration of those terms previously contemplated in the original agreement. *Sears Roebuck v. Avery*, 593 S.E. 2d 424, 433 (N.C. Ct. App. 2004); *Badie*, 79 Cal. Rptr. 2d at 288; *Shea*, 827 A.2d at 362.

The Court notes, however, that an essential prerequisite for this limitation is that Plaintiffs did not continue to use their credit cards after Defendant's attempted amendment. In this case, Defendant closed the Perrys' account in March 2000, and Plaintiff Baier stopped using her credit card in January 2001. Neither Ms. Baier nor the Perrys used their credit cards after the arbitration provision was mailed in February 2001. If Plaintiffs had used their credit cards, they would have manifested their assent to the new term, and the change would no longer be unilateral.

V. CONCLUSION

For the foregoing reasons, Defendant's motion to compel arbitration and stay proceedings pending completion of arbitration is denied. An appropriate Order follows.

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Defendant.	:	**No. 04-507**

ORDER

AND NOW, this **6th** day of **July, 2004**, upon consideration of FleetBoston Financial Corporation's Motion to Compel Arbitration and Stay Proceedings Pending Completion of Arbitration, Plaintiffs' response thereto, and all supplemental briefing thereon, and for the foregoing reasons, it is hereby **ORDERED** that:

Defendant's Motion to Compel Arbitration and Stay Proceedings (Document No. 6) is **DENIED**.

BY THE COURT:

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Berle M. Schiller, J.