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

PAMELA M. SODI	:	MISCELLANEOUS
	:	
v.	:	
	:	
DISCOVER FINANCIAL SERVICES, INC.	:	NO. 04-0128

O'NEILL, J. NOVEMBER 30, 2004

MEMORANDUM

Plaintiff, Pamela Sodi, representing herself pro se, filed a complaint, styled "motion to vacate arbitration award" on July 20, 2004, pursuant to Section 12 of the Federal Arbitration Act, 9 U.S.C. § 12 (2004), against defendant, Discover Financial Services, Inc., asserting this Court's jurisdiction pursuant to Section 9 of the FAA, 9 U.S.C. § 9, and alleging that the arbitration award granted to Discover per an arbitration between Discover and Sodi violated Section 10 of the FAA, 9 U.S.C. § 10. Defendant filed a motion to dismiss for failure to state a claim upon which relief can be granted. Defendant has also filed a counterclaim requesting that I confirm the arbitration award and enter judgment in its favor for the arbitration award and court costs, plus interest. I issued an Order requiring each party to file supplemental briefs addressing whether this Court has subject matter jurisdiction to vacate the arbitration award, and specifically directing the parties to address whether Virgin Islands Hous. Auth. v. Coastal Gen. Constr. Servs. Corp., 27 F.3d 911 (3d Cir. 1994) and related cases preclude the exercise of federal jurisdiction over the instant case. Pursuant to that Order defendant filed a motion to dismiss for lack of jurisdiction and plaintiff filed a supplemental brief in favor of jurisdiction. Before me now is

defendant's motions to dismiss for lack of jurisdiction and failure to state a claim upon which relief can be granted and plaintiff's replies thereto.

BACKGROUND

Plaintiff, Pamela Sodi, is a citizen of the Commonwealth of Pennsylvania. Defendant, Discover, is a corporation incorporated in the State of Delaware with its principal place of business in the State of Illinois that regularly conducts business in Pennsylvania. Discover issued Sodi a credit card in 1995 under a credit card agreement that did not include an arbitration clause. At some point after she opened a credit card account with Discover, Discover supplemented its credit card agreement with an arbitration clause, which provides that either Discover or a cardholder may elect to resolve claims or disputes through binding arbitration with one of two arbitration firms, including the National Arbitration Forum ("NAF").[1] Sodi continued to use her credit card to make purchases after Discover added the arbitration clause. Sodi defaulted on her

[1]The Arbitration of Disputes provision of the Discover Cardmember Agreement states, in relevant part:

> In the event of any past, present or future claim or dispute . . . between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the Agreement or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration.
>
> IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. PRE-HEARING DISCOVERY RIGHTS AND POST-HEARING APPEAL RIGHTS WILL BE LIMITED. NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY. . . Your account involves interstate commerce, and this provision shall be governed by the Federal Arbitration Act (FAA). The arbitration shall be conducted, at the option of whoever files the arbitration claim, by either JAMS/Endispute (JAMS) or the National Arbitration Forum (NAF) in accordance with their procedures in effect when the claim is filed.

credit card account. Shortly thereafter, Discover elected to proceed with arbitration and filed a claim with NAF to recover the balance due on Sodi's credit card account, $11,577.39. Sodi filed an answer and counter claim in arbitration.

On November 10, 2003, Discover served Sodi and filed its arbitration complaint with NAF. Sodi filed her appearance and answer, and counterclaim, with NAF Arbitration on January 9, 2004. On May 12, 2004, after consideration of each party's arguments, NAF dismissed Sodi's counterclaim and entered judgment in favor of Discover for the balance due on her credit card account. Sodi instituted the present action in this Court on July 20, 2004

STANDARD OF REVIEW

I. Motion to Dismiss for Failure to State a Claim

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss all or part of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6) (2004). In ruling on a 12(b)(6) motion, I must accept as true all well-pleaded allegations of fact, and any reasonable inferences that may be drawn therefrom, in plaintiffs' complaint and must determine whether "under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir.1996) (citations omitted). Nevertheless, in evaluating plaintiff's pleadings I will not credit any "bald assertions." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429 (3d Cir. 1997). Nor will I accept as true legal conclusions or unwarranted factual inferences. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "The complaint will be deemed to have alleged sufficient facts if it adequately put the defendant on notice of the essential elements of the plaintiff's cause of action." Nami, 82 F.3d at 65. A Rule 12(b)(6) motion is proper only if plaintiff "can prove no set of facts in support of his claim which would

entitle him to relief." Conley, 355 U.S. at 45-46.

II. Motion to Dismiss for Lack of Subject Matter Jurisdiction

A motion under Rule 12(b)(1) may be treated as either a facial attack on the complaint or a factual challenge to the court's subject matter jurisdiction. Gould Elecs., Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000). A court reviewing a facial attack may consider only the allegations of the complaint and any documents referenced therein or attached thereto in the light most favorable to the plaintiff. Id. In reviewing a factual attack, a court may consider evidence outside the pleadings. Id. Plaintiff bears the burden of persuasion when subject matter jurisdiction is challenged, but the legal standard for surviving a Rule 12(b)(1) motion is a low one. Kehr Packages v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991). "A claim may be dismissed under Rule 12(b)(1) only if it 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous.'" Gould, 220 F.3d at 178. Nevertheless, "dismissal for lack of jurisdiction is not appropriate merely because the legal theory alleged is probably false, but only because the right claimed is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" Kulick v. Pocono Downs Racing Ass'n, 816 F.2d 895, 899 (3d Cir.1987), quoting Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666 (1974). Any dismissal based on lack of subject matter jurisdiction is not a dismissal on the merits and, therefore, plaintiff may seek relief in state court, if appropriate. Mason v. Witt, 74 F. Supp. 2d 955, 958 (E.D. Pa. 1999).

DISCUSSION

Generally, there are two bases for federal subject matter jurisdiction: federal question jurisdiction pursuant to 28 U.S.C. § 1331; and diversity jurisdiction pursuant to 28 U.S.C. § 1332. Under 28 U.S.C. § 1332, the federal courts have subject matter jurisdiction over cases in which complete diversity exists and the amount in controversy exceeds the jurisdictional limit of $75,000. See 28 U.S.C. § 1332(a); TM Marketing, Inc. v. Art & Antiques Assocs., L.P., 803 F. Supp. 994, 1000 (D.N.J. 1992). The amount in controversy here--$11,577.39--does not approach the jurisdictional limit. Thus, federal subject matter jurisdiction based on diversity is not present.

Under 28 U.S.C. § 1331, district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The Supreme Court has explained that "section 1331 authorizes the courts to hear either originally or by removal only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." Virgin Islands Hous. Auth. v. Coastal Gen. Constr. Servs. Corp., 27 F.3d 911, 916 (3d Cir. 1994) quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983) (internal quotations omitted). Thus, federal question jurisdiction exists in one of two circumstances: (1) where federal law creates the cause of action; or (2) the complaint poses a substantial federal question. See id.

Section 9 of the FAA provides, in relevant part: "If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made." 9 U.S.C. § 9 (2004). Section 10(a) of the FAA further provides:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). However, the Supreme Court has observed that "the Arbitration Act is something of an anomaly in federal court jurisdiction." Virgin Islands Hous. Auth. v. Coastal Gen. Constr. Servs. Corp., 27 F.3d 911, 915 (3d Cir. 1994) quoting Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) (internal quotations omitted). "The statute creates federal substantive law regulating an agreement to arbitrate, but it does not create any independent federal question jurisdiction under 28 U.S.C. § 1331 . . . or otherwise." Id. "The Arbitration Act does not supply federal jurisdiction where it does not otherwise exist"; federal subject matter jurisdiction exists only if it is otherwise available through some independent source such as 28 U.S.C. §§ 1331 (federal question) or 1332 (diversity). Id.; TM Marketing, 803 F. Supp. at 998. Moreover, this independent basis for federal jurisdiction must appear on the face of the complaint. Virgin Islands Hous. Auth., 27 F.3d at 915 citing Prudential-Bache Sec., Inc. v. Fitch, 966 F.2d 981 (5th Cir. 1992). Thus, Sodi may only proceed if it is apparent on the face of her complaint that it poses a substantial federal question.

The face of Sodi's complaint reveals that jurisdiction is based solely on Section 9 of the FAA creating a federal cause of action. Sodi alleged in her complaint that this Court has jurisdiction to vacate the arbitration award because "the transaction is in interstate commerce[,]

involves a question of interstate commerce[, and] does not provide for a specific jurisdiction wherein an award may be confirmed or vacated." This argument is inapposite. As discussed above, the FAA does not itself confer federal subject matter jurisdiction. Sodi further alleges in her brief in support of her motion to vacate the arbitration award that the arbitration award should be vacated because: (1) NAF was biased in favor of Discover; (2) Discover had a duty to disclose to Sodi that NAF was biased; (3) the cardmember agreement is a contract of adhesion and the arbitration clause is the void as unconscionable; and (4) Sodi did not agree to the arbitration clause which was added after she opened an account with Discover. None of these arguments is sufficient to confer federal jurisdiction.

I am mindful, however, that pro se complaints are to be construed liberally and held to a "less stringent standard than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972). Accordingly, I will review Sodi's arguments in her supplemental brief even though she failed to make these claims in her complaint. Apparently after reading Virgin Islands Hous. Auth., Sodi alleged that this Court had subject matter jurisdiction for two reasons. First, Sodi asserts:

> Subject matter jurisdiction based in the federal question of interstate commerce is proper because of the preeminence of authority of the Federal Arbitration Act over state arbitration statutes. The FAA allows a motion to vacate to be filed within 90 days of the award, while Pennsylvania's statute only allows 30 days. Because the 30 day period had elapsed, Plaintiff was forced to file the present Motion in the only jurisdiction that could hear her claim.

Presumably, Sodi is alleging that there is a substantial federal question at issue here because: (a) the state 30 day time period is preempted by the federal 90 day time period, provided for in 9 U.S.C. § 12; and (b) Sodi failed to file her motion to vacate with a state court within the 30 day time period prescribed by state law but within the 90 day time period prescribed by 9 U.S.C. §

12, thus leaving her without the possibility of pursuing her claim in state court.

There is no preemption issue in this case. State law is preempted by federal law only if Congress intended for it to be preempted. See Olde Discount Corp. v. Tupman, 1 F.3d 202, 206 (3d Cir. 1993) citing United States Dep't of Treasury v. Fabe, 508 U.S. 491 (1993). There are three methods of discerning congressional intent to preempt state law: (1) express or explicit preemption; (2) implied preemption; or (3) "actual conflict" preemption. Id. First, Congress may explicitly define the extent to which its enactments preempt state law. Olde Discount, 1 F.3d at 206 qouting Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299-300 (1988). There is no explicit language in the FAA that preempts adjudication of claims in state courts. Second, in the absence of explicit statutory language, Congress may implicitly indicate an intent to occupy a given field to the exclusion of state law. Id. "Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the states, where the federal interest in the field is sufficiently dominant, or where the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." Id. at 206-07 (internal quotations omitted). The FAA is not so pervasive or dominant; nor does it occupy the entire field of arbitration or review of arbitration judgments. Third, when Congress has not entirely displaced state regulation in a particular field, state law may be preempted where it actually conflicts with federal law. Id. at 207. "Such a conflict will be found when it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Id. (internal quotations omitted). These two time periods are not in conflict with one another. It is not impossible to comply both the state and federal filing periods and the 30 day time period does not

create an obstacle to the fulfillment of the FAA's purpose. The fact that Sodi is left only with the possibility of pursuing her claim in federal court and will perhaps be precluded from advancing a claim in state court, because she failed to file within the 30 day window prescribed by state law, does not create a substantial federal question.

Second, Sodi asserts that "[s]ubject matter jurisdiction is also proper because of the federal question of the right to a fair trial, which is the essence of Plaintiff's motion to vacate Defendant's arbitration award, is implicated in the present case." Presumably, Sodi is alleging that there is a substantial federal question at issue here because the arbitration agreement and hearing denied her the right to a fair trial as protected by the due process clause of the 5th Amendment to the United States Constitution. This averment fails to state a claim upon which relief can be granted. An arbitration agreement does not deprive an individual of her right to a fair trial or any other of his or her due process rights. See Choice v. Option One Mort. Corp., No. 02-6626, 2003 U.S. Dist. LEXIS 9714, * 30 (E.D. Pa. May 12, 2003). Rather, an arbitration agreement merely provides an alternative forum for the adjudication of such rights. Id. "[T]he principles underlying the constitutional concept of due process, namely notice and opportunity to be heard, are preserved and protected in the arbitration setting." Id. quoting Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (internal quotations omitted); see also Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1970) (noting that due process tolerates variances in forum appropriate to the nature of case); Boddie v. Conn., 401 U.S. 371, 378 (1971) (form of due process provided may depend on importance of interests involved and nature of subsequent proceedings). To the extent that the arbitration hearing was "unfair," "procured by corruption, fraud, or undue means," or evidenced "partiality or corruption in the arbitrators," as Sodi is alleging, she may pursue such

a claim under the Federal Arbitration Act in a state court. However, without an independent source of federal subject matter jurisdiction, this Court is without jurisdiction to hear this claim.

An appropriate order follows.

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

PAMELA M. SODI	:	MISCELLANEOUS
	:	
v.	:	
	:	
DISCOVER FINANCIAL SERVICES, INC.	:	NO. 04-0128

ORDER

AND NOW, this 30th day of November 2004, upon consideration of defendant's motion to dismiss for failure to state a claim upon which relief can be granted, counterclaim, motion to dismiss for lack of jurisdiction, and plaintiff's replies thereto, and for the reasons set forth in the accompanying memorandum, it is ORDERED as follows:

1. Defendant's motion to dismiss is GRANTED and plaintiff's complaint is DISMISSED.

2. The Court lacking jurisdiction of this matter, defendant's counterclaim is DISMISSED.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.