BY THE COURT:

DATE SIGNED: August 30, 2024

Electronically signed by Ryan J. Hetzel
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT WASHINGTON COUNTY

WILLIAM LINDALA,
Plaintiff,
vs.
PORTFOLIO RECOVERY ASSOCIATES, LLC,
Defendant.

Case No. 23CV395

DECISION and ORDER

Procedural Posture

The material underlying facts of the case are not in dispute. On or about July 12, 2016, William Lindala applied for a credit card account with Synchrony Bank. *Declaration of Joline White,* ¶*3; Electronic Doc #21*. On or about July 14, 2016, Synchrony issued and mailed the credit card and cardholder agreement to Mr. Lindala, Id. ¶*4.*

The cardholder agreement contained the following language:

SECTION III: STANDARD PROVISIONS AMAZON.COM STORE ACCOUNT AGREEMENT
ABOUT THE CREDIT CARD ACCOUNT AGREEMENT

This Agreement. This is an Agreement between you and Synchrony Bank, 170 Election Road, Suite 125, Draper, UT 84020, for your credit card account. By opening or using your account you agree to the terms of the entire Agreement. The entire Agreement includes the four sections of this document and the application you submitted to us in connection with the account. These documents replace any other agreement relating to your account that you or we made earlier or at the same time.

Parties To This Agreement. This Agreement applies to each accountholder approved on the account and each of you is responsible for paying the full amount due, no matter which one uses the account. We may treat each of you as one accountholder and may refer to each of you as "you" or "your". Synchrony Bank may be referred to as "we", "us" or "our". […]

RESOLVING A DISPUTE WITH ARBITRATION

PLEASE READ THIS SECTION CAREFULLY. IF YOU DO NOT REJECT IT, THIS SECTION WILL APPLY TO YOUR ACCOUNT, AND MOST DISPUTES BETWEEN YOU AND US WILL BE SUBJECT TO INDIVIDUAL ARBITRATION. THIS MEANS THAT: (1) NEITHER A COURT NOR A JURY WILL RESOLVE ANY SUCH DISPUTE; (2) YOU WILL NOT BE ABLE TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING; (3) LESS INFORMATION WILL BE AVAILABLE; AND (4) APPEAL RIGHTS WILL BE LIMITED.

- **What claims are subject to arbitration**

1. If either you or we make a demand for arbitration, you and we must arbitrate any dispute or claim between you or any other user of your account, and us, our affiliates, agents and/or Amazon.com if it relates to your account, except as noted below.
2. We will not require you to arbitrate: (1) any individual case in small claims court or your state's equivalent court, so long as it remains an individual case in that court; or (2) a case we file to collect money you owe us. However, if you respond to the collection lawsuit by claiming any wrongdoing, we may require you to arbitrate.
3. Notwithstanding any other language in this section, only a court, not an arbitrator, will decide disputes about the validity, enforceability, coverage or scope of this section or any part thereof (including, without limitation, the next paragraph of this section and/or this sentence). However, any dispute or argument that concerns the validity or enforceability of the Agreement as a whole is for the arbitrator, not a court, to decide.

- **No Class Actions**

YOU AGREE NOT TO PARTICIPATE IN A CLASS, REPRESENTATIVE OR PRIVATE ATTORNEY GENERAL ACTION AGAINST US IN COURT OR ARBITRATION. ALSO, YOU MAY NOT BRING CLAIMS AGAINST US ON BEHALF OF ANY ACCOUNTHOLDER WHO IS NOT AN ACCOUNTHOLDER ON YOUR ACCOUNT, AND YOU AGREE THAT ONLY ACCOUNTHOLDERS ON YOUR ACCOUNT MAY BE JOINED IN A SINGLE ARBITRATION WITH ANY CLAIM YOU HAVE.

If a court determines that this paragraph is not fully enforceable, only this sentence will remain in force and the remainder will be null and void, and the court's determination shall be subject to appeal. This paragraph does not apply to any lawsuit or administrative proceeding filed against us by a state or federal government agency even when such agency is seeking relief on behalf of a class of borrowers, including you. This means that we will not have the right to compel arbitration of any claim brought by such an agency.

- **How to start an arbitration, and the arbitration process**

1. The party who wants to arbitrate must notify the other party in writing. This notice can be given after the beginning of a lawsuit or in papers filed in the lawsuit. Otherwise, your notice must be sent to Synchrony Bank, Legal Operation, P.O. Box 29110, Shawnee Mission, KS 66201-5320, ATTN: ARBITRATION DEMAND. The party seeking arbitration must select an arbitration administrator, which can be either the American Arbitration Association (AAA), 1633 Broadway, 10th Floor, New York, NY 10019, www.adr.org, 1-800-778-7879, or JAMS, 620 Eighth Avenue, 34th Floor, New York, NY 10018, www.jamsadr.com, 1-800-352-5267. If neither administrator is able or willing to handle the dispute, then the court will appoint an arbitrator.
2. If a party files a lawsuit in court asserting claim(s) that are subject to arbitration and the other party files a motion with the court to compel arbitration, which is granted, it will be the responsibility of the party asserting the claim(s) to commence the arbitration proceeding.
3. The arbitration administrator will appoint the arbitrator and will tell the parties what to do next. The arbitrator must be a lawyer with at least ten years of legal experience. Once appointed, the arbitrator must apply the same law and legal principles, consistent with the FAA, that would apply in court, but may use different procedural rules. If the administrator's rules conflict with this Agreement, this Agreement will control.
4. The arbitration will take place by phone or at a reasonably convenient location. If you ask us to, we will pay all the fees the administrator or arbitrator charges, as long as we believe you are acting

> in good faith. We will always pay arbitration costs, as well as your legal fees and costs, to the extent you prevail on claims you assert against us in an arbitration proceeding which you have commenced.
> • **Governing Law for Arbitration**
> This Arbitration section of your Agreement is governed by the Federal Arbitration Act (FAA). Utah law shall apply to the extent state law is relevant under the FAA. The arbitrator's decision will be final and binding, except for any appeal right under the FAA. Any court with jurisdiction may enter judgment upon the arbitrator's award.
> • **How to reject this section**
> You may reject this Arbitration section of your Agreement. If you do that, only a court may be used to resolve any dispute or claim. To reject this section, you must send us a notice within 60 days after you open your account or we first provided you with your right to reject this section. The notice must include your name, address and account number, and must be mailed to Synchrony Bank, P.O. Box 965012, Orlando, FL 32896-5012. This is the only way you can reject this section.

Plaintiff's Memorandum in Support of Motion to Compel, pp. 3-6 citing Ex. 1 at ¶ 4, Ex. 1-A; Ex. 2 at ¶ 9, Ex. 2-E (emphasis in original).

Lindala did not opt out of the arbitration provision in accordance with the terms of the contract. On October 1, 2019, Mr. Lindala made his last payment to the Account. *Declaration of Joline White, ¶7; Electronic Doc #21.* On May 10, 2020, the Account charged-off due to non-payment. Id. ¶*8.* On or about June 18, 2020, Synchrony sold a portfolio of accounts to Portfolio Recovery Associates, LLC, (PRA) that included Mr. Lindala's account. Id. ¶*9.* The sale of the accounts was done using a "Forward Flow Accounts Purchase Agreement." *Plaintiff's Memorandum in Support of Motion to Compel, p. 11.* The "Forward Flow Accounts Purchase Agreement" stated in part:

> Purchase and Sale. On each Transfer Date, Seller shall sell and Buyer shall buy all right, title and interest in and to the Accounts, without any encumbrances, with respect to which Buyer has received a Notification File, with recourse and warranty limited to that specifically set forth in this Agreement.

Id. *citing* Ex. 2-B; pp. 5-6, ¶ 2.1.

On or about July 13, 2022, Defendant Portfolio Recovery Associates, LLC sent Lindala a letter which stated, in part, "Account Transferred to Litigation Department" and "Your account has been transferred to our Litigation Department. At this time, no attorney within the Litigation Department has personally reviewed the particular circumstances of your account." *Complaint, ¶¶ 21, 22, Electronic document #2.* Lindala claims that PRA's representation that Lindala's account "has been transferred to the Litigation Department" is a sham because, upon information and belief, no attorneys actually review individual consumer accounts within PRA's "Litigation Department". Id. ⁋ *25*. Mr. Lindala filed this lawsuit under sections 1692e, e (3), e (5), and e (10) of the Fair Debt Collection Practices Act ("FDCPA") on behalf of a class of Wisconsin residents who received the same letter he received from PRA. Id. ⁋ *41*. Mr. Lindala also pleads similar claims under the Wisconsin Consumer Act.

Issue

Is the arbitration agreement between Lindala and Synchrony Bank binding upon Lindala and PRA, after PRA required the account from Synchrony?

An original creditor does not automatically assign its rights under an arbitration agreement anytime it sells or assigns the account. Lester v. Portfolio Recovery Assocs., LLC, *2018 U.S. Dist. LEXIS 115527 (N.D. Al. July 11, 2018)*. This mirrors Wisconsin law that a third-party non-signatory to an arbitration agreement cannot compel another party into arbitration without taking an express assignment of the right to compel arbitration. *See* Sussex Tool & Supply, Inc. v. Mainline Sewer & Water, Inc., *231 Wis. 2d 404, 409 (Ct. App. 1999)*. This is also true of New York Law, which governs the Forward Flow Accounts Purchase Agreement:

> [A] valid assignment must contain clear evidence of the intent to transfer the person's rights and the subject matter of the assignment must be described sufficiently to make it capable of being readily identified. To be effective, the assignment must be clear and unequivocal and must be noticed to the obligor.

MBNA Am. Bank, N.A. v. Nelson, *841 N.Y.S.2d 826, 826 (Civ. Ct., Richmond Co. 2007) (citing* Tirgan v. Mega Life & Health Ins., *304 N.J. Super. 385, 390, 700 A.2d 1239 (N.J. Super. Ct. 2007).*

Therefore, the contractual terms of the Forward Flow Accounts Purchase Agreement control what rights were transferred from Synchrony to PRA, and whether the transfer was limited to the "account" or to all rights from the cardholder agreement between Lindala and Synchrony. If Synchrony merely transferred the account or the receivables, PRA has no independent right to assert arbitration. If Synchrony transferred "all rights and obligations' under the original cardholder agreement, then PRA would have the right to demand arbitration in accordance with the terms of the original cardholder agreement.

The Forward Flow Accounts Purchase Agreement had the following terms of sale:

> 2.1 Purchase and Sale. On each Transfer Date, Seller shall sell and Buyer shall buy ***all right, title and interest in and to the Accounts***, without any encumbrances, with respect to which Buyer has received a Notification File, with recourse and warranty limited to that specifically set forth in this Agreement.

Electronic Document #32, pp 5-6, (Emphasis added).

The Forward Flow Accounts Purchase Agreement contains the following definitions:

"Account" means any charged-off credit account owned by Seller, that is being sold to Buyer pursuant to the terms of this Agreement, with respect to which there is an Account Balance. Accounts shall be randomly selected in a manner that will not have a negative material impact on collectability. *Electronic Document #32, p. 2.*

In interpreting the Forward Flow Accounts Purchase Agreement, both parties cite to recent Milwaukee County Circuit Court decisions. Those decisions, Portfolio Recovery Associates, LLC v. Suxstorf, *Milwaukee County Circuit Court, Case No. 2021CV002967* and Portfolio Recovery Associates, LLC v. Hankins, *Milwaukee County Circuit Court, Case No. 2021CV005172* in reviewing similar Forward Flow Accounts Purchase Agreements involving PRA, reached different conclusions.

In Suxstorf, Milwaukee County Circuit Court Judge Gwendolyn Connelly determined that the agreement did not transfer the right to arbitrate between US Bank and PRA. *See generally, Electronic Exhibit #24.* The Forward Flow Agreement contained similar language, "The Bill of Sale and Assignment shall sell, transfer, assign, set over, quitclaim and convey to Buyer, without recourse, warranty or representation, all right, title and interest of Seller in and to each of the Assets sold." Id., *at p.2.* Judge Connelly went on to evaluate how the term "Assets" was defined in the agreement and determined that the word "Assets" was similar to the term "Receivables" in Pounds

v. Portfolio Recovery Associates, LLC, *274 N.C. 201, 211, 851 S.E.2d 423 (Ct. App. 2020)*. In the Pounds decision, the Court concluded that the Bill of Sale did not identify the assignment of the right to arbitrate nor did the Bill of Sale demonstrate an intent of the parties to assign "all of the rights" of the original creditor to PRA. Id, *at p.428.* The Pounds Court found that the right to arbitrate was neither clearly assigned, nor implicitly assigned. Id.

While the term "all right, title and interest" in the Suxstorf Forward Flow Agreement is similar, the words "assets" appear nowhere in the Synchrony Bank/PRA Forward Flow Agreement. The word receivable is not used either. The Synchrony Bank/PRA Forward Flow Agreement transfers "Accounts". *Electronic Document #32, pp 5-6.*

Judge Pedro Colon reached a different conclusion in the Hankins decision. Judge Colon was interpreting a Synchrony Bank and PRA Forward Flow Agreement. *See generally Electronic Document #23.* In Hankins, the sale agreement between Synchrony and PRA "transfers, sells, conveys, grants, and delivers to [PRA], its successors and assigns . . . to the extent of its ownership, the Accounts". Id. *p. 2*. This language is the exact same language in the bill of Sale in this matter. *See Electronic Document #22, p. 7.* Judge Colon was persuaded by a bankruptcy case In re May, 591 B.R. 712 (E.D. Ark. 2018). Judge Colon reasoned, "both Purchase Agreements contemplated that the assignee would service the account post-transfer, and the agreements provided '[a]ll actions or omissions by Buyer with respect to the Accounts, including (but not limited to) all servicing, billing, processing, collections, and recovery operations and any communications or notices to Account Debtors, shall conform in all respects to any and all Applicable Laws.'" Hankins, p. 5. Ultimately, Judge Colon, like the Judge in the bankruptcy case In re May, determined that the word "all means all" and determined that the arbitration provision was transferred along with the "accounts".

Both Suxstorf and Hankins are circuit court opinions, and as such are not binding on this court. Brandt v. Lab. & Indus. Rev. Comm'n, *160 Wis. 2d 353, 365, 466 N.W.2d 673, 677 (Ct. App. 1991), aff'd, 166 Wis. 2d 623, 480 N.W.2d 494 (1992*). The decisions are however, persuasive authority based on their reasoning and logic. Id.

The word "Arbitration" appears nowhere in the Forward Flow Agreement. The word "Account means any charged-off credit account owned by Seller, that is being sold to Buyer pursuant to the terms of this Agreement, with respect to which there is an Account Balance." *Electronic Document #32, p. 2.* The Forward Flow Agreement contains an additional definition:

> **"Account Agreements"** means the Account terms and conditions provided by Seller to Buyer with respect to each Account, *which are the contractual terms and conditions that were specifically applicable to the Account and were applicable as of date of charge-off.* (Emphasis added).

Electronic Document #32, p. 2.

The Court finds this definition persuasive. The Plaintiff, Mr. Lindala had no contractual privity with Portfolio Recovery Associates. Any rights that PRA has with respect to Mr. Lindala must flow from the contractual language of the purchase agreement between Synchrony Bank and PRA. Both Synchrony Bank and PRA had control of the contractual terms and language in the purchase agreement and specifically the Forward Flow Accounts Purchase Agreement.

Without question, the Forward Flow Agreement could have been clearer on its face. However, this Court finds that the transfer of "all right, title and interest" in the "accounts" did intend to transfer more than an asset or a receivable, particularly where the definition of "account agreement" includes "the contractual terms and conditions that were specifically applicable to the Account and were applicable as of date of charge-off." The Court finds that the document expresses an intent to transfer "all right" including the "contractual terms and conditions". While not identical in the rationale stated in Hankins, the Court does find the decision in that matter, with virtually identical language persuasive.

For reasons stated herein, the Court GRANTS PRA's Motion to Compel Arbitration and Orders this matter Stayed pending completion of the arbitration. Consequently, the court need not address PRA's alternative argument that it has a right to enforce the Arbitration Agreement pursuant to the doctrine of estoppel.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL.

Dated at West Bend, Wisconsin.

Electronic: Attorney John D. Blythin
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