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14
15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 FOR THE COUNTY OF SAN DIEGO

17 JESSICA BAKER and HERBERT A.
18 BERGER individually, and on behalf of all
other persons similarly situated,

19 Plaintiffs,

20 v.

21 VISA INTERNATIONAL CORP., a Delaware
22 corporation; VISA U.S.A., INC. a Delaware
corporation ; and DOES 1-20, Inclusive,

23 Defendants.

Case No. GIC 839908

SECOND AMENDED CLASS ACTION
COMPLAINT FOR:

- (1) UNFAIR COMPETITION;
- (2) VIOLATIONS OF THE CONSUMER
LEGAL REMEDIES ACT;
- (3) BREACH OF FIDUCIARY DUTY;
AND
- (4) IMPOSITION OF CONSTRUCTIVE
TRUST

SEEKING DAMAGES, PUNITIVE
DAMAGES, RESTITUTION, AND
INJUNCTIVE RELIEF

1
2 Plaintiffs Jessica Baker ("Baker") and Herbert A. Berger ("Berger"), on behalf of
3 themselves and all others similarly situated worldwide, upon personal knowledge as to
4 themselves and their acts, and as to all other matters upon information and belief based
5 upon, inter alia, the investigations made by their attorneys, allege as follows:
6

7 **INTRODUCTION AND NATURE OF THE CASE**

8
9 1. From 1985 to 1987 defendants designed, developed, and implemented a
10 multi-currency conversion scheme that permitted Visa International Corp. and Visa
11 U.S.A., Inc. to earn a secret profit by charging worldwide customers an undisclosed mark-
12 up on currency conversion for transactions effected in foreign currencies. Defendants
13 maintain Visa's multi-currency conversion system up to and including the date of the filing
14 of this action.

15 2. To carry out their scheme, defendants "sold" consumers on the benefits of
16 using a Visa card when making purchases in foreign currencies. According to defendants'
17 own advertising, Visa-branded cards are accepted at more than twenty million locations in
18 more than 150 countries, making "Visa the closest thing there is to a universal currency."
19 The alternative would be to convert U.S. dollars at retail rates and then carry foreign cash
20 while in foreign countries (or the reverse).

21 3. To further induce consumers into using Visa cards for international
22 transactions, defendants promised cardholders that the conversion rate would be at a
23 "wholesale market rate" and that Visa would only charge a 1% fee. However, Visa added
24 an undisclosed mark-up to the currency conversion, in addition to the 1% fee. While an
25 individual consumer may not notice a \$.10 to \$.40 mark-up on every \$100 spent in a
26 foreign country, based upon the billions if not trillions of dollars in transactions,
27 Defendants were able to generate hundreds of millions of dollars in improper profits.
28

1 sublicense the use of that brand to the member banks for use according to the terms set
2 forth in the by-laws and operating regulations.

3 14. Visa U.S.A. is Visa International's licensee for the Visa trademarks and
4 brand in this country, and sublicenses the use of the brand to member banks in the United
5 States.

6 15. Visa U.S.A. enters into contractual relationships with member financial
7 institutions, authorizing them to use the Visa payment system and the Visa mark.

8 16. Visa controls its members by requiring them to adhere to its By-Laws and
9 Operating Rules and Regulations. A member can be expelled for violations of the By-
10 Laws.

11 17. Visa U.S.A. is managed by a Board of Directors (elected by its members)
12 and by a management team. This team is responsible for the day-to-day operations and has
13 certain authority delegated by the Board.

14 18. The Visa U.S.A. Board of Directors, with minor exceptions, is comprised of
15 senior executive officers of its member banks.

16 19. Visa U.S.A. charges various fees to its members in order to finance its
17 operations.

18 20. Although Visa operates on a not-for-profit basis for the benefit of its
19 members, to the extent that fees are generated from sources outside the Visa network and
20 its member banks, (e.g., from cardholders), such revenues are a form of "profit" in that
21 they may be used to reduce the expenses for operating the Visa network and thereby
22 reduce the fees and assessments chargeable to Visa's member banks. In other words, these
23 revenues are a form of profit for Visa's members.

24 21. Member banks in the United States are members of Visa U.S.A., which in
25 turn is a member of Visa International.

26 22. The operating structure of Visa is complex; it is owned by its member banks,
27 it provides network services to its member banks, and it provides currency conversion as
28 part of the network services, but has no contracts with cardholders. This structure creates a

1 circular flow of responsibility where Visa can argue that it is not liable for breach of
2 contract by conversion rates in excess of that permitted by the cardholder agreement and
3 the member banks can argue that they do not charge for currency conversion. However,
4 Courts have held that California's unfair competition law is designed to address business
5 practices that run the gamut of human ingenuity. This case involves one such business
6 practice.

7 **THE CURRENCY CONVERSION SCHEME**

8 23. Foreign currency exchange rates are what it costs to exchange one country's
9 currency for another country's currency. For example, in August and September 2004,
10 Baker traveled to Europe. If not for her Visa card, she would have had to pay for her hotel,
11 meals, admissions fees, souvenirs and other expenses in Euros or British pounds. Since
12 her money is all in U.S. dollars, she would have to use (sell) some of her dollars to buy
13 British pounds or Euros.

14 24. If she had gone to her bank before she left and bought \$1,000 worth of
15 foreign currency and received 565.83 British pounds (£565.83), then each dollar is worth
16 .56583 British pounds. This is the exchange rate for converting dollars to pounds. If
17 £565.83 was not enough cash for the trip, Baker would have to exchange more U.S. dollars
18 for pounds while in England. If she bought another \$1,000 worth of British pounds from a
19 bank in England and received only £557.02 for her \$1,000, the exchange rate for
20 converting dollars to pounds would have dropped from .56583 to .55702. In other words,
21 U.S. dollars were worth less compared to the British pound than they were before Baker
22 left on vacation.

23 25. Visa offers a "solution" for the consumer. Visa advertises to consumers the
24 "benefits" of using a Visa card while traveling in lieu of converting the currencies and
25 carrying cash:

26 Visa cards are the world's most widely used form of "plastic"
27 payment.... There are more than one billion Visa, Visa
28 Electron, Interlink, PLUS, and Visa Cash cards in the market
today. Visa-branded cards are accepted at more than twenty

1 million locations in more than 150 countries, making Visa the
2 closest thing there is to a universal currency.

3 [http://www.usa.visa.com/about_visa/about_visa_usa/ viewed January 11, 2006]

4 26. When a foreign-based merchant, selling a product or service in a foreign
5 currency, accepts an American consumer's Visa card, the merchant may be paid in the
6 foreign currency but Visa charges the consumer in U.S. dollars. Before 1987, Visa settled
7 and cleared with foreign merchants exclusively in U.S. dollars. Thus, foreign banks
8 participating in the Visa system had to settle with Visa in U.S. dollars and convert amounts
9 in foreign currencies into U.S. dollars. These foreign banks were free to mark up the
10 currency conversion rates prior to converting the transaction costs into U.S. dollars. Thus,
11 the foreign banks and merchants were making an extra profit.

12 27. Because of routine fluctuations in exchange rates, and opportunistic delays in
13 processing transactions, foreign banks were able to take advantage of these market
14 fluctuations which resulted in less favorable rates for the cardholder and attendant
15 uncertainty in what consumers could reasonably expect by way of currency exchange
16 rates.

17 28. Visa did not have an effective way of regulating the rates and was also
18 allowing individual foreign banks to retain the profit on the mark up. Not surprisingly, this
19 generated complaints from members and cardholders about excessive rates from foreign
20 banks and unpredictable rates.

21 29. In 1985, defendants concocted a scheme that would allow Visa to charge an
22 extra "conversion fee" and to keep the profit associated with a mark-up on the currency
23 conversion rates. Defendants intended this conversion fee to be a "selling point" for Visa
24 members to their cardholders (the Class) because it was purportedly a favorable conversion
25 rate. To advance this selling point, defendants coined the phrase the "wholesale market
26 rate." This term was intended to make consumers believe they were getting the best rate
27 available and only having to pay a 1% conversion fee.

28

1 30. The use of the term "wholesale" was intended to, and in fact did, imply that
2 the rate offered to cardholders was at Visa's cost and it would make no profit (apart from
3 the 1% fee.) The use of the term "market" was intended to, and in fact did, imply a rate
4 that would be objectively established by a free market system. The primary market for
5 currency exchange is the "interbank market" where banks, insurance companies, large
6 corporations and other large financial institutions exchange their currencies into other
7 currencies. The interbank market creates a published "interbank rate" that is widely
8 reported and is available to institutions like Visa that trade in large quantities. Therefore,
9 Visa should be using the interbank rate when converting currency on behalf of consumers.

10 31. This new multi-currency conversion system was approved by the Board of
11 Directors of Visa in October of 1986 and became effective March 31, 1987. A currency
12 conversion fee of 1% of the rate in dollars was then added thereto. This 1% is not the
13 subject of this litigation. The conversion rate was purportedly set by Visa, not the member
14 banks, at either "(1) a wholesale market rate or (2) a government-mandated rate in effect
15 one day prior to the processing date." (In a few countries, the government mandates a
16 conversion rate so that it is not subject to market fluctuations).

17 32. Visa understood and expected the 1% fee and the conversion rate would be
18 passed through the member banks directly to the cardholders for payment, and in fact this
19 has occurred. The issuing banks act as the conduits through which Visa's 1% fee and
20 conversion rate are collected from the cardholder.

21 33. The Visa Board of Directors approved Operating Regulations stating that the
22 "Currency Conversion Rate" is defined as a "wholesale market rate ... increased by a one-
23 percent conversion fee."

24 34. After the multi-currency conversion system was in place, defendants
25 advertised to consumers this new "benefit" associated with using a Visa card
26 internationally. The new Visa cardholder agreement, which defendants require Visa
27 members to use, described the foreign currency conversion process. It promises
28 cardholders a specific and uniform procedure that would insure that consumers dealing in

1 foreign currency transactions are provided the wholesale market rate. In exchange for
2 providing consumers the benefit and convenience of a “wholesale” rate, Visa charges
3 consumers a 1% conversion fee. The “wholesale market rate” is not defined in the
4 cardholder agreement.¹

5 35. In fact, this “wholesale” currency conversion rate utilized by Visa in its
6 multi-currency conversion system does not accurately reflect a wholesale market
7 conversion rate. To the contrary, since adopting its undisclosed system Visa has
8 consistently added approximately 10 to 40 basis points (.10% - .40%) to the interbank rate
9 as published in financial newspapers such as the *Wall Street Journal* and *Reuters* (these
10 profits are *in addition* to the 1% that is disclosed to consumers in the cardholder’s
11 agreement).

12 36. For each of the currencies that need to be exchanged throughout the world
13 each day, Visa obtains exchange rates from third-party banks at which it knows it can
14 exchange currencies. It then applies the mark-up to the currency; that marked-up rate is
15 used to exchange the currency. Most of the currencies between, say, U.S. and British
16 pounds, are offset within the Visa system (albeit, at the marked up price.) However,
17 because the volume of the respective currencies does not match evenly, Visa knows that
18 after the offset, it will hold excess currency that needs to be exchanged. It then exchanges
19 the excess currency at a profit with the third-party bank. Visa conceals the fact that
20 cardholders have paid a marked-up exchange rate and that Visa makes a secret profit from
21 exchanging the excess currency.

22 37. To prevent consumers from discovering the true conversion rate, or the
23 propriety thereof, Visa conceals the information that a consumer would need to determine
24 the actual conversion rate utilized by Visa. Visa states in its cardholder agreements that it
25 utilizes the wholesale market rate in effect one day prior to the “processing date” which
26 may be different than the “transaction date” or the “posting date.” However, Visa does not
27 disclose to the cardholder any of the Concealed Information. Without this information,

28 ¹ Visa changed the cardholder agreements in Spring 2005, presumably in response to this lawsuit.
The agreements further explain how the wholesale rate is selected, but continue to be inadequate.

1 cardholders are prevented from discovering the fact that Visa is adding a markup to each
2 transaction by using a conversion rate that is not a wholesale market rate or an interbank
3 rate.

4 38. In other words, since adopting its multi-currency conversion system, Visa
5 has been generating an improper profit of approximately \$.10 - \$.40 for every \$100.00, by
6 adding an undisclosed mark-up on every transaction. The damages caused by this
7 improper practice are estimated to be nearly \$40 - \$60 million dollars per year since Visa's
8 improper practice was adopted in 1987.

9 AGENCY ALLEGATIONS

10 39. At all relevant times, Visa acted as the agent for the cardholders in the
11 process of performing the conversion of foreign currencies for them. Visa had the power
12 to alter the cardholders' legal relationship with others (*i.e.* Visa' member banks) in
13 connection with the conversion of cardholders' currencies (that is, it had the right to
14 extinguish the cardholder's obligation to pay foreign merchants in their local currency.) In
15 turn, the cardholders had the right to exercise control over Visa with respect to its
16 conversion of currencies. Visa and the cardholders intended to enter into an agent-
17 principal relationship. Thus, Visa owed a fiduciary duty to the cardholders with respect to
18 its handling and charging for converting foreign currencies for the cardholders.

19 40. Alternatively, the member banks through which the cardholders opened Visa
20 accounts (a/k/a issuing banks), acted as the cardholders' agents, and Visa, in turn, acted as
21 the member banks' agent (*i.e.* a subagent) for the purpose of converting currencies for the
22 cardholders. As a subagent, Visa owed to the cardholders all of the duties of an agent.

23 CLASS ACTION ALLEGATIONS

24 41. Plaintiffs bring this action on behalf of themselves and on behalf of all other
25 persons similarly situated. The Class which Plaintiffs seek to represent is defined as
26 follows: "All persons worldwide who (i) had or have a Visa branded credit card and (ii) for
27 whom Visa has converted currencies in connection with said Visa-branded credit card
28 from March 31, 1987 through the date of judgment" (the "Class"). Excluded from the
Class are defendants, any entity in which defendants have a controlling interest, and any of

1 defendants' subsidiaries, affiliates, officers, and directors. By this action, Plaintiffs seek to
2 obtain for themselves and the Class injunctive relief, damages caused by defendants'
3 fraudulent, unlawful, and unfair business act or practice, and any other remedy permitted
4 by law.

5 42. The Class is composed of millions of persons the joinder of whom is
6 impracticable, and the disposition of their claims in a class action will benefit both the
7 parties and the Court.

8 43. There is a well-defined community of interest in the questions of law and
9 fact involved affecting the parties to be represented. The questions of law and fact
10 common to the Class predominate over questions which may affect individual Class
11 members, including but not limited to the following:

12 a. Whether §§17200, *et seq.* of the Cal. Bus. & Prof. Code were violated
13 by defendants' acts, as alleged in the Complaint;

14 b. Whether §§1750, *et seq.* of the Cal. Civ. Code were violated by
15 defendants' acts, as alleged in the Complaint;

16 c. Whether defendants should be compelled to disgorge the excessive
17 mark-up above the widely reported wholesale market rate or the interbank rate;

18 d. Whether defendants should be required to disclose the Concealed
19 Information;

20 e. Whether Plaintiffs and the Class have suffered injury, and, if so, the
21 appropriate measure of restitution; and

22 f. Whether defendants breached their fiduciary duties.

23 44. Plaintiffs are asserting claims that are typical of the claims of the entire
24 Class. The harm suffered by Plaintiffs and all other members of the Class was caused by
25 the same improper conduct by defendants of making a secret profit by adding a concealed
26 mark-up to the proper rate.

27 45. Plaintiffs will fairly and adequately represent and protect the interests of the
28 Class in that Plaintiffs have no interests antagonistic to those of the Class. Plaintiffs have

1 retained counsel who are competent and experienced in consumer and class action
2 litigation.

3 46. The prosecution of separate actions by individual members of the Class
4 would create a risk of inconsistent or varying adjudications with respect to individual
5 members of the Class, which would establish the risk of incompatible standards of conduct
6 for the defendants and would risk repetitious trials involving issues of fact and law
7 common to plaintiffs and the Class.

8 47. Questions of law and fact common to all members of the Class predominate
9 over questions affecting only individual members, and a class action is superior to any
10 other method for the fair and efficient adjudication of this controversy.

11 48. Plaintiffs and the Class have suffered injury in fact and have lost money as a
12 result of defendants' wrongful conduct as alleged herein. Absent a class action, defendants
13 will likely retain the monies obtained through their wrongdoing and will continue their
14 wrongful course of conduct. Because of the small size of the individual Class members'
15 claims, few, if any, Class members could afford to seek legal redress for the wrongs
16 complained of herein. Absent a representative action, the Class members will continue to
17 suffer losses and will allow defendants to retain the proceeds of their ill-gotten gains.
18 Defendants will continue to engage in their unlawful and unfair business practices.

19 49. Defendants possess, control, or have access to lists of customers which can
20 identify the Class members herein. Notice of pendency of this action can be given either
21 by regular mail or by publication, which cost, under California law, can reasonably be
22 imposed upon defendants.

23 **FIRST CAUSE OF ACTION**

24 **(Violations of the Unfair Trade Practices Act)**

25 **Against All Defendants**

26 50. Plaintiffs reallege and incorporate by reference each and every allegation
27 above as if fully set forth at this point.
28

1 paid to defendants by reason of defendants' unlawful, unfair and/or deceptive acts and
2 practices. The Class is also entitled to actual and punitive damages as well as any other
3 relief that the court deems proper.

4 53. The Consumer Legal Remedies Act prohibits unfair methods of competition
5 and unfair or deceptive acts or practices undertaken by any person in a transaction intended
6 to result or which results in the sale of goods. Specifically the Act prohibits, *inter alia*, the
7 following acts:

8 a) Using deceptive representations in connection with goods or services (§ 1770(4))

9 b) Representing that goods or services have characteristics, uses, and benefits which
10 they do not have (§ 1770(5));

11 c) Advertising goods or services with intent not to sell them as advertised
12 (§1770(9));

13 d) Representing that a transaction confers or involves rights, remedies, or
14 obligations which it does not have or involve, or which are prohibited by law (§1770(14));

15 e) Representing that the subject of a transaction has been supplied in accordance
16 with a previous representation when it has not (§ 1770(16)).

17 54. As a direct and proximate result of the acts and practices alleged above,
18 which were, and continue to be, in violation of the Consumer Legal Remedies Act,
19 members of the Class who effected transactions in foreign currency lost and continue to
20 lose monies in a sum currently unknown but subject to proof at the time of trial. This
21 Court is empowered to, and should, order restitution to all persons from whom defendants
22 unfairly and/or unlawfully took money in order to accomplish complete justice.

23 55. On December 20, 2004, more than thirty days prior to the commencement of
24 this cause of action, Plaintiff Baker served notice upon defendants in accordance with Civil
25 Code § 1782, that defendants had employed or committed methods, acts, or practices
26 declared unlawful by the Consumer Legal Remedies Act and requested that defendants
27 correct or otherwise rectify the services alleged to be in violation of the Act. A true a
28 correct copy of the notice is attached hereto as Exhibit 1. Defendants have not responded

1 to this notice, nor have they taken any action to correct or otherwise rectify the services
2 alleged to be in violation of the Act.

3 **THIRD CAUSE OF ACTION**

4 **(Breach of Fiduciary Duty)**

5 **Against all Defendants**

6 56. Plaintiffs reallege and incorporate by reference each and every allegation
7 above as if fully set forth at this point.

8 57. As the agent or subagent for Plaintiffs and the class, defendants and each of
9 them owed to Plaintiffs and the class, the highest duties of loyalty, honesty, and care in
10 converting foreign currencies for the benefit of Plaintiffs and the class.

11 58. Defendants, and each of them, knowingly, recklessly, and/or culpably
12 breached their fiduciary duties of loyalty, honesty, and care to Plaintiffs and the class by,
13 *inter alia*, devising and obtaining an undisclosed, secret profit from the foreign currency
14 conversion process, as described above.

15 59. As a direct result of the breach of fiduciary duty, Plaintiffs and the class have
16 been damaged.

17 **FOURTH CAUSE OF ACTION**

18 **(Imposition of Constructive Trust)**

19 **Against all Defendants**

20 60. Plaintiffs reallege and incorporate by reference each and every allegation
21 above as if fully set forth at this point.

22 61. By virtue of defendants' improper activities as alleged herein, defendants
23 hold funds secretly obtained from the conversion process as a constructive trust for
24 Plaintiffs and the class.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiffs pray for judgment against defendants and each of
27 them as follows:

- 28 1. That this action may be maintained as a class action;

1 2. For a finding that defendants have committed unfair, unlawful or fraudulent
2 business acts or practices in violation of California Business & Professions Code,
3 §§ 17200, et seq. and that defendants be required to pay restitution to all persons from
4 whom defendants unfairly and/or unlawfully took money in the form of a full refund to all
5 persons or disgorgement of all improper profits;

6 3. For a finding that defendants have violated California Civil Code §§ 1750, et
7 seq. and that defendants be required to pay actual and punitive monetary damages as well
8 as restitution to the members of the Class;

9 4. For a finding that defendants hold the secret profits from the foreign
10 currency conversion scheme in constructive trust for the Plaintiffs and the members of the
11 class and for an order to return the secret profits to the Plaintiffs and the members of the
12 class.

13 5. That defendants' unfair, unlawful or fraudulent business acts or practices be
14 enjoined;

15 6. That defendants be ordered to disclose on consumers' billing statements (i)
16 the amount in foreign currency; (ii) the amount in home currency; (iii) the processing date;
17 (iv) the identification of the time and date used for calculating the exchange rate; and (v)
18 the interbank exchange rate between the home currency and foreign currency at such time
19 and date;

20 7. For interest at the maximum rate allowed by law;

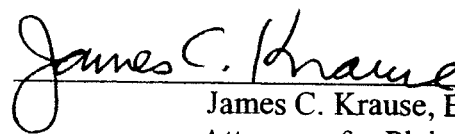
21 8. That plaintiffs and the members of the Class be awarded reasonable
22 attorneys' fees, expenses and costs of suit; and

23 9. For such other and further relief as the Court may deem just and proper.

24 DATED: January 20, 2006

25 KRAUSE, KALFAYAN, BENINK & SLAVENS, LLP

26 By



James C. Krause, Esq.
Attorneys for Plaintiffs